



1-1-1989

Eroding Roe: The Politics and Constitutionality of California's Parental Consent Abortion Statute

Gregory W. Herring

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Gregory W. Herring, *Eroding Roe: The Politics and Constitutionality of California's Parental Consent Abortion Statute*, 20 PAC. L. J. 1167 (1989).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol20/iss4/6>

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Eroding *Roe*: The Politics And Constitutionality of California's Parental Consent Abortion Statute*

In the 1973 decision *Roe v. Wade*,¹ the United States Supreme Court upheld the qualified constitutional right of women to obtain abortions.² The Court limited the states' traditional powers to decide whether or not women could have access to the procedure.³ The *Roe* decision held that a woman may have an abortion without interference from the state until approximately the end of the first trimester of her pregnancy.⁴ After that point, only a state's "legitimate interests" in preserving and protecting the health of the pregnant woman and the "potentiality of human life" could qualify the abortion

* This comment was originally written as part of the Stauffer Research Series. The Stauffer Research Series represents the published products of the John Stauffer Fellowship Program, conducted under the auspices of the Center for Research at the University of the Pacific, McGeorge School of Law. Funded by a generous endowment by the John Stauffer Charitable Trust, the Program was conceived in 1976 as one which would support faculty-supervised student research into legal topics of significance to California.

1. 410 U.S. 113 (1973).

2. Abortions or miscarriages caused by disease or injury to a pregnant woman are described as "spontaneous." See generally Comment, *Committee to Defend Reproductive Rights v. Myers: Medi-Cal Funding of Abortion*, 9 GOLDEN GATE U.L. REV. 361, 366 n.43 (1978) (providing definitions of common abortion-related medical terms). The term "abortion," when used in this comment, will refer only to an induced abortion.

3. *Roe*, 410 U.S. at 139. See *infra* text accompanying notes 33-64 (describing the legal history of the availability of abortions in the United States).

4. *Roe*, 410 U.S. at 163.

right.⁵ Nevertheless the controversy over the powers of the states to restrict abortion rights has continued.⁶

The abortion battle has recently focused on the rights of minors to obtain abortions.⁷ California Health and Safety Code section 25958 is one of many statutes enacted by various states to restrict this right of minors.⁸ The statute forbids an abortion to be performed on an unemancipated⁹ minor without the consent of a parent or a judicial determination of her maturity or "best interest."¹⁰ The provisions of this enactment, if upheld by California courts, will inhibit the exercise by mature minors of their rights to obtain abortions.¹¹ The parental or judicial consent law was to take effect on January 1, 1988, and

5. *Id.* at 162. A state may prohibit abortions after the point of fetal viability except to preserve a pregnant woman's life or health. *Id.* at 163-64. *See infra* note 33 (providing definition of viability).

6. *See generally* K. LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD*, in *CALIFORNIA SERIES ON SOCIAL CHOICE AND POLITICAL ECONOMY* (1984) (explaining why the opposing positions in the abortion debate are held with such fervor and why the abortion issue is so divisive in America today). "Even on the local level, once-sleepy school boards have become tumultuous when asked to consider the place of abortion in sex education curricula, and zoning boards have split over whether an abortion clinic should be permitted to operate in a community." *Id.* at 1 (citing *Abortion Clinic Zoning: The Right to Procreative Freedom and the Zoning Power*, WOMEN'S RTS. L. REP., 5 (1979)).

7. *See* CAL. CIV. CODE § 25 (West 1982) (a minor is any person under 18 years of age).

8. CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1989) (enacted by 1987 Cal. stat. ch. 1237 sec. 3, at ____). These enactments take the form of parental "notification" or "consent" statutes. "Notification" statutes require a parent of a pregnant unemancipated minor to be notified about the minor's abortion. "Consent" statutes, like section 25958, require a parent of a pregnant minor to consent to the child's abortion. *See Bonavoglia, Kathy's Day in Court*, Ms., April 1988, at 46, 51 (thirteen states have enacted parental "notification" statutes, eight of which have been enjoined and two of which are inactive and unconstitutional. Twenty-one states, including California, have passed parental "consent" statutes, seven of which have been enjoined and seven of which are inactive and unconstitutional). *See also* Cal. Senate, Health and Human Services Comm. [hereinafter H.H.S. Staff Analysis of A.B. 2274] at 2 (June 25, 1987) (Health and Safety Code section 25958 is similar to the following: (1) Senate Bill 2230 (Speraw, 1984) which failed in the Senate Committee on Health and Human Services in 1985, (2) Senate Bill 7 (Montoya, 1985) which passed that committee but failed in the Assembly in 1986, and (3) Senate Bill 11 (Montoya, 1987) which was introduced but not heard in 1987. *Id.* In the 1987 Legislative Session, four parental consent bills were introduced in the California Legislature: (1) Assembly Bill 2274 (Frazee), (2) Senate Bill 11 (Montoya), (3) Assembly Bill 77 (Wyman), and (4) Assembly Bill 67 (Isenberg).

9. *See* CAL. CIV. CODE § 62 (West 1982) (an emancipated minor is one who has entered a valid marriage, is on active duty in the United States armed forces or has been declared emancipated by a superior court pursuant to California Civil Code section 64). *See also id.* § 64 (a minor must be at least 14 years old and meet other specified requirements to be declared emancipated by a superior court). *See generally* Comment, *California's Emancipation of Minors Act: The Costs and Benefits of Freedom From Parental Control*, 18 CAL. W.L. REV. 482 (1982) (describing the provisions and effects of the 1978 California Emancipation of Minors Act).

10. CAL. HEALTH & SAFETY CODE § 25958(c) (West Supp. 1989).

11. According to records of the State of California Department of Health Services,

has been enjoined pending determination of the statute's constitutionality under both the federal and California constitutions.¹²

The purpose of this comment is to establish that the sexual privacy rights of mature minors under the California Constitution would be violated by the enforcement of section 25958. This comment will first describe the language of section 25958 and the history of abortions in the United States.¹³ Next, it will analyze the right of privacy of female minors under the federal Constitution in view of competing state and parental interests in their welfare.¹⁴ Then it will highlight the significance to pregnant minors of the explicit right of privacy provided by the California Constitution.¹⁵ Finally, this comment will suggest another scheme which would better accommodate all three competing interests: (1) The right of sexual privacy of female minors in California; (2) the state's interest in the well-being of minors; and (3) the rights of parents to raise their children.¹⁶

I. CALIFORNIA HEALTH AND SAFETY CODE SECTION 25958

The language of California Health and Safety Code Section 25958 explicitly erects legal hurdles that an unemancipated minor must clear in order to have an abortion.¹⁷ Section 25958 specifies that for a pregnant unemancipated minor to receive an abortion, the minor

Medical Care Statistic Section, approximately 34,367 abortions were performed for minors who were age seventeen or younger in 1985. This number represents an estimated 11.3% of all abortions performed in California for patients of all ages. *See* A. Torres, J.D. Forrest and S. Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 FAM. PLAN. PERSP., No. 6 (November/December 1980) (approximately 55% of all abortion patients who are 17 or younger said that their parents knew of their abortions). Of the 1,170 surveyed patients, 9% said they would have a self-induced or illegal abortion if forced to notify their parents. *Id.* Nine percent of the minors said that they would bear their babies if forced to notify their parents. *Id.* *See also* LOS ANGELES DAILY J., Jan. 5, 1988, at 8 (describing the short and long-term effects on the total number of abortions obtained by minors in Utah, Rhode Island and Minnesota after those states enacted their parental notice and consent laws). Short-term teen abortion rates in all three states dipped or remained steady. Only in Rhode Island did long-term levels of teen abortions drop, and then only for 16-17 year-olds. *Id.*

12. The statute received its first legal challenge in December of 1988 in San Francisco Superior Court, where it was enjoined pending a full trial review of the constitutional implications involved. *San Francisco Chronicle*, February 26, 1988, at 14. On February 25, 1988, the California Supreme Court refused to overturn the injunction, allowing the issue to first be heard by lower courts. *Id.*

13. *See infra* notes 17-64 and accompanying text.

14. *See infra* notes 65-194 and accompanying text.

15. *See infra* notes 195-301 and accompanying text.

16. *See infra* notes 302-21 and accompanying text.

17. CAL. HEALTH & SAFETY CODE § 25958(a)-(d) (West Supp. 1989).

must obtain the written consent of a parent or legal guardian.¹⁸ A minor who cannot obtain that consent or who elects not to inform a parent or guardian may file with a juvenile court a petition to obtain permission to have an abortion.¹⁹ This mechanism is known as a "judicial bypass" procedure.²⁰ Any person who performs an abortion on a minor who does not satisfy the requirements of section 25958 is guilty of a misdemeanor and may be punished by a fine of up to \$1,000, or up to thirty days in a county jail.²¹

Section 25958 provides that the hearing must be set within three days after the petition is filed.²² The juvenile court must maintain the confidentiality of the minor's identity.²³ Although the juvenile court must inform the minor that she has the right to court-appointed counsel at her request,²⁴ the minor may participate in the juvenile court proceedings on her own behalf.²⁵ The juvenile court must consider all evidence presented at the abortion authorization hearing and make one of three findings.²⁶

First, the juvenile court may find that the minor is sufficiently mature and informed to make the decision on her own and has consented to the abortion on that basis.²⁷ In that case, the court must grant its authorization.²⁸ Second, the juvenile court may find the minor not sufficiently mature and informed to make the abortion decision. In that event, the court must consider whether the performance of the abortion would be in the best interest of the minor.²⁹ A juvenile court that decides that the procedure would be in the minor's best interest must grant the petition without the consent of, or notice to, the minor's parents or guardian.³⁰

18. *Id.* (except for a medical emergency requiring immediate medical action). *See generally Review of Selected 1987 California Legislation*, 19 PAC. L.J. 646 (1988) (describing the provisions of Health & Safety Code section 25958).

19. CAL. HEALTH & SAFETY CODE § 25958(b) (West Supp. 1989) (the juvenile court must assist the minor or person designated by the minor in preparing the petition and notices required by the statute).

20. *Id.* (the petition must specifically present the minor's reasons for the request).

21. *Id.* § 25958(f).

22. *Id.*

23. *Id.* (the minor may file the petition using only her initials or a pseudonym).

24. *Id.* No fees or costs incurred by the procedures required by section 25958 are to be chargeable to the minor or her parents or guardian. *Id.* § 25958(e).

25. *Id.* (and the juvenile court may appoint a guardian ad litem for her).

26. *See id.* § 25958(c)(2) (the judgment must be entered within one court day of the submission of the matter).

27. *Id.* § 25958(c)(1).

28. *Id.*

29. *Id.* § 25958(c)(2).

30. *Id.*

Third, the juvenile court may find that the pregnant minor is not sufficiently mature or informed to make the abortion decision and that an abortion would not be in her best interest. If the court so finds, it must deny the minor's petition.³¹ The minor may appeal the judgment.³² The social implications of these provisions can be best determined by analyzing them within an historical framework.

II. A SUMMARY OF THE LEGAL HISTORY OF ABORTIONS IN THE UNITED STATES

A review of historical legal attitudes towards abortions shows that section 25958 contradicts traditional American legal views. The common law allowed a pregnant woman free access to an abortion until the woman's fetus was found viable.³³ Not until the mid-nineteenth century were criminal abortion statutes enacted.³⁴ By 1900 every state had prohibited all abortions except those necessary to save the life of an endangered pregnant woman.³⁵ Concern for the health of pregnant women ostensibly motivated these prohibitions,³⁶ but cul-

31. *Id.*

32. *Id.* § 25958(d) (by filing a written appeal any time after the initial judgment). Judgment must be entered within one court day after submission of the petition of appeal. *Id.* The appellate hearing must be set within 5 days after the finding for the appeal. *Id.* Section 25958 does not specify the practice and procedure on these appeals or the time and manner in which any record on appeal must be prepared and filed, but instead directs the State Judicial Council to do so. *Id.*

33. *Roe v. Wade*, 410 U.S. 113, 160 (1973). The Court accepted the definition of viability as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid," and is presumably capable of "meaningful life outside the mother's womb." *Id.* Viability usually occurs at about the seventh month of pregnancy, although it may occur earlier. *Id.* See also *Planned Parenthood v. Danforth*, 428 U.S. 52, 65 (1976) (approving Missouri statutory definition of viability). The Missouri statute defined viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." *Id.* at 63. The determination of the viability of a particular fetus is properly that of the attending physician. *Id.* at 64.

34. *Roe*, 410 U.S. at 138 (Connecticut, in 1821, was the first state to prohibit abortions by women with "quick" fetuses). At common law, "quickening" was defined as "the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy." *Id.* at 132. New York enacted a statute in 1828 that was to become a model anti-abortion statute for the other states. *Id.* at 138. The New York statute made the abortion of a quick fetus a felony offense and the abortion of a fetus that had not quickened a misdemeanor. *Id.* An abortion necessary to protect a pregnant woman's health was not penalized by the legislation. *Id.* Legislators during the latter half of the nineteenth century began ignoring the quickening distinction and increased penalties for non-life-threatening abortions. *Id.* at 139.

35. K. LUKER, *supra* note 6, at 15.

36. See Comment, *supra* note 2, at 364 (anti-abortion publicity focused on stories of the deaths and mutilations of women caused by abortion procedures, despite the fact that "any

tural themes and social struggles lay beneath the changes.³⁷ For nearly 70 years legal access to the procedure was controlled by the medical profession's power to determine when a pregnant woman's life was "endangered."³⁸

By the end of the 1950's, most states forbade access to an abortion unless a woman's health³⁹ or life was at risk.⁴⁰ Some states, however, began liberalizing their abortion policies during the 1960's.⁴¹ The trend setters were Colorado, North Carolina, California and New York.⁴² In the several years before the *Roe* decision, about one-third of the states had enacted more liberal abortion statutes.⁴³

Proponents of the right to obtain abortions have organized "pro-choice" groups while opponents of these rights describe themselves as "pro-life."⁴⁴ These two forces hold polarized emotional philoso-

surgery performed in the nineteenth century was highly dangerous") (emphasis in original); Means, *The Phoenix of Abortional Freedom* . . . , 17 N.Y.L.F. 335, 383 (1971) (although abortion laws were enacted to protect the lives of women from dangerous surgical procedures, states continued to enforce them even after the advent of antiseptic techniques made abortions safer than childbirth).

37. K. LUKER, *supra* note 6, at 15. See Comment, *supra* note 2, at 363 (other forces that combined to support anti-abortion laws were the following: (1) A declining birthrate caused by the change from a mainly rural and agricultural economy to an urban and industrialized one; (2) the efforts of physicians of the period to upgrade their professional status as evinced by the emergence of the American Medical Association, which condemned abortions; (3) the use of abortion as a means of birth control by married and upper-class women; (4) a popular backlash to the suffragist and women's movements; and (5) communities' reactions to increasingly bold advertising and publicity by abortionists). *Id.*

38. See K. LUKER, *supra* note 6, at 67-68.

39. *Roe v. Wade*, 410 U.S. 113, 139 (1973) (Alabama and the District of Columbia were unique in allowing an abortion to save a woman's health, and not just to preserve her life). See also D.CAMPBELL, DOCTORS, LAWYERS, MINISTERS: CHRISTIAN ETHICS IN PROFESSIONAL PRACTICE 114 (1982) (circumstances for which a pregnant woman's health was deemed in danger included those in which the woman was the victim of rape, incest or mental abuse).

40. *Roe*, 410 U.S. at 139 n.34 (citing Comment, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*, U. Ill. L.F. 177, 179 (1972) (in 1961, 25 states permitted abortions to save or preserve a woman's life).

41. *Roe*, 410 U.S. at 140 (most of these "liberal" abortion statutes were patterned after the American Legal Institute (A.L.I.) Model Penal Code section 230.3). See *Doe v. Bolton*, 410 U.S. 179, 205-07 app. B (1973) (the appendix includes a copy of the A.L.I. abortion statute that distinguished legal "justified" abortions from "unjustified" abortions which were illegal). A physician could "justify" an abortion by determining that the procedure would prevent "grave impairment" of the pregnant woman's physical or mental health, or that the child would be born with a mental or physical defect or that the pregnancy resulted from "rape, incest or other felonious intercourse." *Id.* at 205.

42. D. CAMPBELL, *supra* note 39, at 114.

43. *Roe*, 410 U.S. at 140 n.37.

44. See Comment, *Committee to Defend Reproductive Rights v. Myers: Procreative Choice Guaranteed for all Women*, 12 GOLDEN GATE U.L. REV. 691, 691 n.3 (1982) (describing the individuals and groups comprising these coalitions). See also K. LUKER, *supra* note 6, at 194-95 "On almost every social background variable [that was] examined, pro-life and pro-choice women differed dramatically." *Id.* For example, the majority of pro-life women surveyed

phies regarding the morality of abortions, making political compromise on abortion issues unlikely.⁴⁵ The national pro-life movement is composed of a mix of churches,⁴⁶ fundamental religious organizations and conservative political groups.⁴⁷ Most of these operate under the umbrella of the National Right to Life Committee.⁴⁸ Major pro-choice organizations include the American Civil Liberties Union (A.C.L.U.), Planned Parenthood and the National Organization of Women.⁴⁹

Both pro-life and pro-choice groups recognize that many abortion regulations are parts of a broader effort to limit and undermine the *Roe* decision.⁵⁰ Pro-life forces have made significant political efforts to limit and overturn the constitutional right of women to obtain abortions. Members of pro-life organizations lobbied for the federal adoption of the "Hyde Amendment"⁵¹ which prohibits Medicaid

reported incomes significantly higher than those of pro-choice women. *Id.* Moreover, of the pro-choice women surveyed, "a considerable portion" of those women were just starting their careers. *Id.* at 194. Ninety-four percent of all pro-choice women surveyed work in the paid labor force, compared to 37% of pro-life women. *Id.* at 195. In addition, surveyed pro-life women generally had "far less education" than surveyed pro-choice women. These figures show a "very complex social reality" of differences between the women of each side of the abortion issue. *Id.* Luker emphasizes the different interests a woman has in reproductive rights issues, based on her socio-economic background.

45. See K. LUKER, *supra* note 6, at xiii "While the militants on both sides would have us believe that the abortion debate is actually very simple, such simplicity is both a necessity and a luxury for them." *Id.* By simplifying the issues of the abortion debate, each faction can instill a sense of righteousness necessary to motivate its believers. This also allows each group's believers the luxury of avoiding the real human dilemmas involved. *Id.*

46. See H.H.S. Staff Analysis of A.B. 2274, *supra* note 8, at 7-8 (church organizations supporting the enactment of the California consent law include the Christian Action Council of Southern California and the California Catholic Conference, among others). See also D. CAMPBELL, *supra* note 39 at 116 (1982) (the coalition also includes Roman Catholics, Orthodox Jews and Evangelicals). But see H.H.S. Staff Analysis of A.B. 2274, *supra* note 8 at 8-9 (religious organizations opposing the law include the Religious Coalition for Abortion Rights of Northern California, Mormons for Choice, the National Council of Jewish Women and the Young Women's Christian Association).

47. See H.H.S. Staff Analysis of A.B. 2274, *supra* note 8, at 8-9 (some notable politically conservative groups supporting the consent law include the Committee on Moral Concerns, the Traditional Values Coalition, the Eagle Forum, the Women's Lobby and the Knights of Columbus). But see *id.* at 8 (Republicans for Choice opposed the law).

48. See Comment, *supra* note 44, at 691 n.3 (the National Right to Life Committee is an umbrella group with over 11,000,000 members and affiliates in all fifty states that organize, fund, and sponsor statewide anti-abortion efforts).

49. See H.H.S. Staff Analysis of A.B. 2274, *supra* note 8, at 8 (other notable opponents of the law include the California Judges Association, the State Bar of California, the Judicial Council of California, the California Chapter of National Association of Social Workers, the American Academy of Pediatrics and the California Commission on the Status of Women).

50. Cf. Comment, *supra* note 2, at 372, (citing Schulte, *Tax Supported Abortions: The Legal Issues*, 21 CATH. LAW. 1, 1 (1975) (describing attempts by pro-life forces and agencies to "keep the impact of these abortion decisions within the narrowest possible confines").

51. Pub. L. No. 94-439, § 1311, 68 stat. 1434 (1976) (amending 42 U.S.C. § 1396 (1965)).

funding of most abortions,⁵² drafted a constitutional amendment to prohibit abortions,⁵³ and convinced legislators to pass legislation to restrict access to abortions.⁵⁴ Despite the efforts and successes of these lobbyists, however, the American public is becoming more sympathetic to abortion all the time.⁵⁵

Since 1973, the Court has twice strongly reaffirmed *Roe*. In *City of Akron v. Akron Center for Reproductive Health*,⁵⁶ the Court enumerated the "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*."⁵⁷ In *Thornburgh v. American College of Obstetricians and Gynecologists*,⁵⁸ the Court, although divided 5-4, refused to retreat from *Roe*.⁵⁹ Justice Blackmun,

52. *Id.* The amendment, which has taken several forms, restricts funding through the Medicaid program of the Social Security Act for abortions not threatening the life of a pregnant woman. *Id.* The United States Supreme Court, in addressing the constitutional issues raised by this legislation, has held that abortion rights entail only the freedom from direct governmental constraints on the availability of the procedure, not the universal economic ability to obtain an abortion. See *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the federal constitutionality of the "Hyde Amendment"). See also *Williams v. Zbaraz*, 448 U.S. 358 (1980) (federal statutes do not require payment for abortions); *Maher v. Roe*, 432 U.S. 464 (1977) (payments for most abortions may be denied poor women); *Beal v. Doe*, 432 U.S. 438 (1977) (the Social Security Act does not require payments for these abortions); *Poelker v. Doe*, 432 U.S. 519 (1977) (a city-funded hospital may provide free child birth assistance without providing corresponding services for most abortions). Compare *Perry, Why the Supreme Court was Plainly Wrong in the Hyde Amendment Case*, 32 STAN. L. REV. 1113 (1980) (*McRae*, which took the constitutionally impermissible view that abortion is morally wrong, is "radically inconsistent" with *Roe*) with *Westin, Correspondence*, 33 STAN. L. REV. 1187 (1981) (responding that *Perry's* premises are wrong since *Roe* "merely prohibited the states from taking any action premised on moral objections to abortion"); compare *Wilkinson, The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975) (supporting the Court's protection of fundamental rights but not economic equality) with *Tribe, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985) (the government's affirmative choice not to fund abortions of poor women can fairly be characterized as a decision to enforce the alienation of those women's rights established by *Roe*).

53. See Comment, *supra* note 2, at 373 n.82 (by March 1979, 14 of a necessary 34 states had passed resolutions calling for a constitutional convention to enact that amendment).

54. See Comment, *Abortion and Privacy: A Woman's Right to Self Determination*, 10 SW. U.L. REV. 173, 177 n.24 (1978) (listing Colorado, Florida, Kentucky, Massachusetts, Missouri, Pennsylvania and Utah statutes enacted after *Roe*, which restrict abortion rights by requiring "consent" requirements, stiff penalties for violation of inconsequential provisions, complex procedural requirements and other obstacles).

55. K. LUKER, *supra* note 6, at 216. In the 1980 Gallup poll, 53% of the Americans surveyed supported abortion in a broad range of circumstances. *Id.* at 217. See generally *id.* at 217-245 (stating that this recent success of the pro-life movement can be explained by both political and pragmatic reasons, and speculating about the future of the abortion debate).

56. 462 U.S. 416 (1983).

57. *Akron*, 462 U.S. at 420 & n.1 (the Court, in its 6-3 opinion, emphasized that *Roe* was carefully considered during its hearings in both the 1971 and 1972 Supreme Court terms). Since *Roe*, the Court has continued to accept and adopt principles allowing women the right to choose whether or not to have an abortion. *Id.*

58. 476 U.S. 747 (1986).

59. *Thornburgh*, 476 U.S. at 747 (invalidating a parental notification statute).

writing for the majority, wrote that the Court must uphold the decision "even when its content gives rise to bitter dispute."⁶⁰

Changes in the membership of the Supreme Court, however, may portend a more precarious position for *Roe*. Justice Stewart, who concurred in the 7-2 decision in *Roe* was replaced by Justice O'Connor, who dissented on the merits in *Akron*.⁶¹ Former Chief Justice Burger concurred in *Roe*, but eventually left the majority in *Thornburgh*.⁶² Justice Scalia is expected to rule against implied fundamental rights like the right to choose an abortion.⁶³ The replacement of Justice Powell, who joined the majority in *Roe*, by Justice Kennedy could therefore decisively shift the Court's stance on reproductive rights.⁶⁴

III. THE FEDERAL CONSTITUTIONAL ISSUES

The constitutionality of California's parental consent abortion statute depends on the strength and scope of each of three competing constitutional interests: (1) The right to sexual privacy;⁶⁵ (2) a state's interests and powers to regulate the health and safety of minors;⁶⁶ and (3) parents' rights to bring up their children without unwarranted state interference.⁶⁷ Yet although the United States Supreme Court has developed extensive case law regarding each interest,⁶⁸ it has not successfully cemented them together in a majority opinion to create a model by which parental consent abortion statutes may be constitutionally measured.⁶⁹ This section will first address the Court's analysis of each of these three competing interests⁷⁰ and then discuss the approaches the Court's members have taken or proposed in judging parental consent statutes.⁷¹ Finally, this section will apply

60. *Id.* at 771.

61. *See Akron*, 462 U.S. at 452 (O'Connor, J., dissenting). *See also Roe v. Wade*, 410 U.S. 113, 167 (1973) (Stewart, J. concurring).

62. *See Thornburgh*, 476 U.S. at 782 (Burger, J., dissenting).

63. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 1347 n.69 (1988).

64. Justice Powell delivered the Court's opinion in *Akron*, and joined the majority in *Thornburgh*. *See Akron*, 462 U.S. at 419, *Thornburgh*, 476 U.S. at 747.

65. *See infra* notes 73-113 and accompanying text.

66. *See infra* notes 114-30 and accompanying text.

67. *See infra* notes 131-45 and accompanying text.

68. *See infra* notes 146-83 and accompanying text.

69. *See infra* notes 184-87 and accompanying text.

70. *See infra* notes 73-145 and accompanying text.

71. *See infra* notes 146-87 and accompanying text.

section 25958's provisions to the most probable federal constitutional tests by which it may be judged.⁷²

A. *The Right To Sexual Privacy*

Despite the lack of an explicit right of privacy in the United States Constitution, the Supreme Court has nonetheless developed two main areas of constitutional privacy protection.⁷³ The oldest area of privacy protects against unreasonable searches and seizures by the government.⁷⁴ The other major area of privacy rights, with which this comment primarily focuses, consists of protection against government regulation of intimate personal activities.⁷⁵ A line of cases has established a right of women to make reproductive health decisions unfettered by government interference.⁷⁶ That right is based on the notion of constitutional "zones of privacy."⁷⁷

As early as 1886, in *Boyd v. United States*,⁷⁸ the United States Supreme Court recognized that "constitutional provisions for the security of person and property should be liberally construed," despite the absence of an enumerated right of privacy.⁷⁹ In 1890, Samuel Warren and Justice Brandeis first advocated the protection of the "inviolable personality" of each person.⁸⁰ Justice Brandeis, dissenting in *Olmstead v. United States*,⁸¹ articulated this right of

72. See *infra* notes 188-94 and accompanying text.

73. See Gerstein, *California's Constitutional Right to Privacy: The Development of the Protection of Private Life*, 9 HASTINGS CONST. L.Q. 385, 387-402 (1982) (describing the development of the two areas in federal jurisprudence and the need for a unified approach to all privacy issues). See also Comment, *Privacy: the New Constitutional Language and the Old Right*, 64 CALIF. L. REV. 347, 353 (1976) (discussing the Supreme Court's approach to privacy rights under the federal Constitution).

74. U.S. CONST. amend. IV. See e.g., *Katz v. United States*, 389 U.S. 347 (1967) (protecting a telephone communication made from the privacy of an enclosed public phone booth).

75. See *Paris Adult Theater 1 v. Slaton*, 413 U.S. 49, 66 n.13 (1973) (this right of privacy "is not just concerned with a particular place, but with a protected intimate relationship").

76. See *infra* notes 78-107 and accompanying text.

77. *Roe v. Wade*, 410 U.S. 113, 152 (1973). See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the marital relationship lies "within the zone of privacy created by several fundamental constitutional guarantees").

78. 116 U.S. 616 (1886).

79. *Boyd*, 116 U.S. at 616 (applying the fourth and fifth amendments to hold unconstitutional the Customs Law of 1874 which authorized federal courts to require specified defendants to produce private books, invoices and papers).

80. Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 205 (1890) (by arguing for tort and injunctive relief to those injured by defamation).

81. 277 U.S. 438 (1928).

privacy.⁸² He stated that the Constitution confers “as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”⁸³

Procreative choice privacy rights of a married couple were first established in *Griswold v. Connecticut*.⁸⁴ That Court held that that conduct could be regulated by a state only when necessary to protect a compelling state interest.⁸⁵ Justice Douglas, writing for the majority, recognized roots of this fundamental right in theories of the “penumbras” and “emanations” of the guarantees of the Bill of Rights.⁸⁶

82. *Olmstead*, at 478 (1928) (Brandeis, J., dissenting) (urging that the founders of the Constitution sought to protect the beliefs, thoughts, emotions and sensations of Americans).

83. *Id.* See *Poe v. Ullman*, 367 U.S. 497, 539-55 (1961) (Harlan, J., dissenting) (Justice Harlan articulated, for the first time, the substantive right of privacy from governmental intrusions). See also Fried, *Privacy*, 77 YALE L.J. 475, 477-78 (1968) (physical privacy is as necessary to “relations of the most fundamental sort: respect, love, friendship and trust” as “oxygen is for combustion”).

84. 381 U.S. 479 (1965). See generally Comment, *supra* note 54, at 175-176 (noting that commentators are divided on the legitimacy of the Court’s discovery of privacy rights in the Constitution). Some commentators argue that discredited substantive due process policies were revived by the Court’s holdings of privacy rights. See e.g., *id.* at 175 n.18, (citing Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (criticizing the use of “substantive” due process theory to reach the results of the “privacy” cases)); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (disapproving of the premises of the *Griswold* decision); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1421-22 (1974) (that the Constitution explicitly protects some privacy rights, like the right to contract, but not others suggests that the broad privacy rights found by the Court had been purposely excluded; nonetheless constitutional modernization by the judiciary has been accepted); Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 252-53 (1965) (the Court was engaging in substantive due process in *Griswold* but dignified and justified its decision by basing it on the emanations-and-penumbra theory); Perry, *Substantive Due Process Revisited: Reflections On (And Beyond) Recent Cases*, 71 NW. U.L. REV. 417, 469 (1976) (modern courts should follow the *Griswold* Court’s example and “breathe into our *corpus juris* the values which we, as a society share (whether or not we shared those values yesterday)”). Other commentators find privacy guarantees within the penumbras of the Constitution. See, e.g., Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065-67 (1980) (the Constitution openly makes substantive-based commitments to the privacy rights of Americans). See also, e.g., Richards, *Interpretation and Histiography*, 58 S. CAL. L. REV. 490, 543-45 (1985) (the vitality of the Constitution is ensured when the Court carries out its duty to articulate changes in the scope of basic human liberties in light of the experiences of each generation).

85. *Griswold*, 381 U.S. at 479 (holding unconstitutional under the fourteenth amendment’s due process clause Connecticut statutes prohibiting the use of contraceptives to all persons).

86. *Id.* at 484 (these penumbras are formed by emanations from the guarantees of the first, third, fourth, fifth and ninth amendments). The Court has found privacy rights rooted in various constitutional provisions. See e.g., *Boyd v. United States*, 116 U.S. 616, 630 (1886) (the fourth and fifth amendments protect against governmental invasions “of the sanctity of a man’s home and the privacies of life”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (fourteenth amendment); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (the fourth amendment creates a “right to privacy, no less important than any other right carefully and particularly reserved to the people”); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (first amendment); *Doe v. Bolton*, 410 U.S. 179, 210 (1973) (Douglas, J., concurring) (elaborating the “blessings of

Justice Goldberg, concurring, noted a privacy right woven in the "entire fabric of the Constitution,"⁸⁷ and Justice Harlan argued that its foundation lay in the "concept of ordered liberty" guaranteed by the Due Process Clause of the Fourteenth Amendment.⁸⁸

Griswold emphasized that the government has heightened expectations of marital privacy by fostering the institution of marriage and protecting it from interference.⁸⁹ Despite the significance placed on the sexual relationship of a married couple in *Griswold*, the Court broadened the privacy right to include the reproductive autonomy of unmarried persons by striking down a Massachusetts statute regulating the use of contraceptives by unmarried couples in *Eisenstadt v. Baird*.⁹⁰ In that decision, the Court conceded that a state may regulate problems associated with premarital sex, but found no rational or legitimate way that the statute distinguished sexual relations between married or unmarried persons.⁹¹ Although the *Eisenstadt* Court did not explicitly rely on a fundamental rights analysis, Justice Brennan, writing for the majority, described the privacy right as "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁹²

liberty" guaranteed in the Preamble of the Constitution). For views on the liberty interests provided by the ninth amendment, see also Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983) (the ninth amendment did not transform implied rights into constitutional rights); Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 WIS. L. REV. 1305, 1309, 1344 (the ninth amendment provides a right of "self-governance").

87. *Griswold*, 381 U.S. at 495 (1965) (arguing that marital privacy must be a fundamental right because of clear historic values in freedom of choice in marital relationships).

88. *Id.* at 500 (the liberty guaranteed by the Due Process Clause is a continuum that "includes a freedom from all substantial arbitrary impositions and purposeless restraints"). Congress eventually enacted a statutory right of privacy of records and information for all citizens in 1974. See Privacy Act of 1974, Pub. L. No. 93-579, 88 stat. 1896 (codified as amended at 5 U.S.C. § 552a) (1974) ("The Congress finds that . . . the right of privacy is a personal and fundamental right protected by the Constitution of the United States"). But see *Meachum v. Fano*, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting) (" . . . law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source").

89. *Griswold*, 381 U.S. at 485 ("[the marital relationship is one] lying within the zone of privacy created by several fundamental constitutional guarantees").

90. 405 U.S. 438 (1972).

91. *Eisenstadt*, 405 U.S. at 448-49.

92. *Id.* at 453. See Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes Adjudication*, 83 YALE L.J. 221, 296 (1973) (*Eisenstadt* implies a new rationale for the privacy right found in *Griswold*). See also Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 198 (*Eisenstadt* "unmasks *Griswold* as based on the idea of sexual liberty rather than privacy").

Five years after *Eisenstadt*, the Court emphasized in *Carey v. Population Services International*,⁹³ that the constitutional privacy right protects an individual's "right of decision" regarding procreation.⁹⁴ The *Carey* Court held unconstitutional a New York statute allowing only licensed pharmacists to distribute contraceptives.⁹⁵ The Court majority agreed that because the statute would "render contraceptive devices considerably less accessible to the public"⁹⁶ and thereby infringe on the constitutional privacy right, only a compelling state interest could overcome an adult's personal decisions regarding contraception.⁹⁷ The Court held that the restriction at issue failed to advance the compelling interests asserted by the state and thus invalidated the statute.⁹⁸ The right of privacy has also been recognized in procreation⁹⁹ and child rearing decisions.¹⁰⁰

The *Roe* Court, building on the foundation of procreational choice privacy rights laid by *Griswold* and *Eisenstadt*, brought abortion within this privacy protection.¹⁰¹ In its decision, the Court held that the Texas statute that prohibited all abortions except when necessary to save the life of a mother improperly infringed on a woman's right of privacy.¹⁰² The Court emphasized the degree of detriment suffered

93. 431 U.S. 678 (1978).

94. *Carey*, 431 U.S. at 688.

95. *Id.*

96. *Id.* at 689.

97. *Id.* at 688 (the constitutional test set forth in *Roe* "must be applied to state regulations that burden an individual's right to decide to prevent contraception or pregnancy" by contraception).

98. *Id.* at 690 (the interests asserted were those "in maintaining medical standards and in protecting potential life" and in protecting the health of citizens from all, including nonhazardous, contraceptives).

99. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (finding unconstitutional under Equal Protection guarantees, an Oklahoma statute mandating the sterilization of specified recidivists convicted of crimes "amounting to felonies of moral turpitude"). See generally Sherlock & Sherlock, *Sterilization and the Constitutional, Statutory and Policy Alternatives*, 60 N.C.L. REV. 943 (1982) (examining the justifications asserted by states for sterilizing the retarded in light of the fundamental constitutional right to procreate).

100. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (the fundamental right of privacy includes the right to obtain a private education for one's children).

101. *Roe v. Wade*, 410 U.S. 113, 153 (1973) (the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"). But see Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) (analyzing the "strand of criticism" centering around this "fundamental interest" branch of the Supreme Court's decisions); Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807 (1973) (the Court, in *Roe*, ignored the "personhood" of all fetuses); Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765, 775 (1973) (the constitutional question in *Roe* was more difficult than that involved in *Griswold* and *Eisenstadt* "only because the asserted state interest is more important, not because of any difference in the individual interests [in privacy] involved").

102. *Roe*, 410 U.S. at 164.

by a woman who is denied a free choice by a state to abort her pregnancy.¹⁰³ *Roe* does not, however, hold that a woman has an absolute, unlimited right to obtain an abortion at any time.¹⁰⁴ Rather, it held that a woman has a fundamental right to choose whether to have an abortion during her first trimester of pregnancy.¹⁰⁵

Because the limited right to choose an abortion is "fundamental," a "strict scrutiny" test must be applied to statutes impairing women's rights to choose abortions.¹⁰⁶ Under a strict scrutiny analysis, a state may justify a regulation of abortion only if it can show a "compelling state interest, and that legislative enactments [have been] narrowly drawn to express only the legitimate state interests at stake."¹⁰⁷

The Court's decisions concerning abortion rights of minors have, however, allowed states to show less than compelling interests. For example, in *Planned Parenthood of Central Missouri v. Danforth*,¹⁰⁸ the Court allowed the state of Missouri to justify its regulation of minors' abortion rights by merely showing "any significant" interest

103. *Id.* at 153. Compare Karst, Book Review, 89 HARV. L. REV. 1028, 1036-37 (1976) (the Court's decisions in *Griswold*, *Eisenstadt* and *Roe* all address the roles women are to play in our society—it "is simply inconceivable that the majority Justices in [*Roe*] were indifferent" to this issue and to the fact that the decision liberated women to exercise a fundamental right to make procreative choices outside of the marriage relationship) with MACKINNON, *Roe v. Wade: A STUDY IN MALE IDEOLOGY IN ABORTION: MORAL AND LEGAL PERSPECTIVES*, 45, 49, 51 (1985) ("[*Roe*] does not free women, it frees male sexual aggression . . . the availability of abortion [removes] the one remaining reason that women have had for refusing sex besides the headache").

104. *Roe*, 410 U.S. at 159 (" . . . it is reasonable and appropriate for a state to decide that at some point . . . the woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly").

105. *Id.* at 155-56 ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' In the recent abortion cases . . . courts have recognized [that principle]).

106. *Id.* at 155. See *id.* at 164-65. The Court found that a state has: (1) no compelling interest during the woman's first trimester of pregnancy; (2) an interest in the health of the pregnant woman during her second trimester of pregnancy that justifies regulation "reasonably related to maternal health"; and (3) a compelling interest during the woman's third trimester that allows the state to regulate and prohibit abortions except to preserve the life and health of the woman for women in that term of pregnancy. *Id.* See also *Doe v. Bolton*, 410 U.S. 179 (1973) (*Roe's* companion case, that clarified and limited the scope of acceptable regulations that ensure the safety of the operation).

107. *Roe*, 410 U.S. at 155. See *id.* at 164-65. The Court found that a state has the following: (1) no compelling interest during the woman's first trimester of pregnancy; (2) an interest in the health of the pregnant woman during her second trimester of pregnancy that justifies regulation "reasonably related to maternal health"; and (3) a compelling interest during the woman's third trimester that allows the state to regulate and prohibit abortions except to preserve the life and health of the woman for women in that term of pregnancy. *Id.* See also *Carey*, 431 U.S. at 684-86, 690-91 (the state bears the burden of proving that any encroachment of sexual privacy rights is necessary to fulfill a competing state interest).

108. 426 U.S. 52 (1976).

of the state.¹⁰⁹ In so holding, the Court reiterated the significant state interest standard enunciated in *H.L. v. Matheson*.¹¹⁰ Additionally, in *Bellotti v. Baird* (Bellotti II),¹¹¹ the Court stated that states are constitutionally required to "act with particular sensitivity" when enacting parental consent abortion statutes.¹¹² Taken together, these standards are a "less rigorous" gauge by which to measure section 25958.¹¹³

B. The State And Parental Rights Over Minors

1. State Interests And Powers

In enacting section 25958, the California Legislature asserted an interest in the health and safety of minors to justify its exercise of legislative power.¹¹⁴ Although minors do have constitutional rights of privacy,¹¹⁵ the extent of these rights is balanced against state interests of protecting minors against unwanted pregnancies¹¹⁶ and minors'

109. *Danforth*, 426 U.S. at 74.

110. 450 U.S. 398, 411 (1981) ("the statute serves a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician").

111. 443 U.S. 622 (1979).

112. *Bellotti II*, 443 U.S. at 642.

113. *Carey v. Population Services International*, 431 U.S. 678, 693 & n.15.

114. 1987 Cal. stat. ch. 1237, sec. 1, at ____ ("The Legislature finds . . . [that] the medical, emotional and psychological consequences of an abortion are serious . . . particularly when the patient is an immature minor . . . Minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences of their actions").

115. *See Carey*, 431 U.S. at 678. "The right to privacy in connection with decisions affecting procreation extends to minors as well as to adults." *Id.* at 693. *See also Bellotti v. Baird*, 443 U.S. 622, 633 (1979) ("A child, merely on account of [her] minority, is not beyond the protection of the Constitution"); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) ("Minors, as well as adults, are protected by the Constitution and possess constitutional rights"); *In re Gault*, 387 U.S. 1, 13 (1967) ("Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"); *In re Scott K.*, 24 Cal. 3d 395, 403, 595 P.2d 105, 110, 155 Cal. Rptr. 671, 676 (1979) (upholding a minor's right of privacy "even when the right imposes a burden on parents or limits parental control") *cert. denied*, 444 U.S. 973 (1979).

116. *See Planned Parenthood Affiliates of Cal., Services to Minors Perspective 1* (May 30, 1986) (teenage pregnancy, abortion and childbearing rates in the United States are the highest in the developed world). Planned Parenthood lists pregnancy as the primary cause of the high school drop-out rate of girls: 50% of all teen mothers do not finish high school. *Id.* *See San Francisco Chronicle*, Feb. 26, 1988, at 14, col. 1 (according to the A.C.L.U., California has the second-highest pregnancy rate in the nation for minors of 15-19 years). The State of California Department of Health Services, in its official 1985 birth records, recorded 18,397 live births by California mothers of ages seventeen and under. *See Bellotti II*, 443 U.S. at 635-40 (a state may limit a minor's right to make decisions involving potentially serious consequences because minors often lack the experience, perspective and judgment to make

own improvident decisions to abort their pregnancies, and preserving the integrity of the family.¹¹⁷

The authority of a state to protect, even by encroaching on constitutionally guaranteed freedoms, the health and safety of minors is broader than that over adults.¹¹⁸ The United States Supreme Court, in *New York v. Ferber*,¹¹⁹ stated that "it is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'."¹²⁰ Certain decisions, including decisions to purchase firearms, cigarettes, alcohol and certain literature, and to enter certain contracts, are considered by states to be outside the scope of minors' abilities to act in the their own or the public's best interest.¹²¹

State interests in the health and safety of minors are exercised in the police power¹²² and the power as *parens patriae*¹²³ for a state to act in a minor's best interest.¹²⁴ This authority has generally been

informed decisions considering all of these consequences). The Supreme Court abstained from interpreting the ambiguous language of the Massachusetts statute in the original hearing of *Bellotti v. Baird*, 428 U.S. 132 (1976). The Court then addressed the issue, after the Massachusetts Supreme Court interpreted the statute, in *Bellotti II*. See generally *Bellotti II*, 443 U.S. at 625-33 (describing the history of the *Bellotti* litigation); Note, *Wherefore Art Thou Danforth: Bellotti v. Baird*, 7 PEPPERDINE L. REV. 965, 975 n.73 (1980) (describing the history of the *Bellotti* litigation and emphasizing the Court's plurality split on the parental consent issue). See generally Comment, *supra* note 54, at 183-92 (discussion of the relevancy of age to the right of privacy, and of parental and state rights over minors).

117. See *Bellotti II*, 443 U.S. at 638 (because of the special role that parents play in bringing up their children, the state has a special interest in encouraging an unmarried pregnant minor to consult her parents in making her decision whether to have an abortion.)

118. See e.g., *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (upholding the application of a law prohibiting the sales of merchandise by minors to a minor distributing religious literature).

119. 458 U.S. 747 (1982).

120. *Ferber*, 458 U.S. at 756-57 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (unanimously upholding a conviction for the violation of a statute prohibiting the production or distribution of material depicting a "sexual performance" by a child under the age of 16)). See *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (considering the special need to protect children from "vulgar," "offensive," and "shocking" broadcasts as a rationale for upholding a Federal Communications Commission action against a radio station).

121. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 72 (1976). See also *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1256-1257 (M.D. Pa. 1975) (the governmental interests furthered by a curfew ordinance override the "interest of minors in being abroad during the nighttime hours") *aff'd*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976).

122. See *Drysdale v. Prudden*, 195 N.C. 722, 728, 143 S.E. 530, 536 (1928) ("That inherent and plenary power in the state over persons and property which enables the people to prohibit all things inimicable to comfort, safety, health and welfare of society").

123. See *In re Gault*, 387 U.S. 1, 16 (1966) ("The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child").

124. See generally *In re Gault*, 387 U.S. 1, 16-17 (1967) (criticizing the doctrine of *parens*

asserted when the health and safety of a minor is at risk.¹²⁵ An abortion, although a statistically safer procedure than childbearing, involves physical and psychological dangers along with moral and emotional implications.¹²⁶ A minor may be especially unable to cope with the implications of an abortion because of her psychological and physical immaturity.¹²⁷ Thus states, by enacting parental consent abortion statutes under their *parens patriae* powers, subordinate the privacy interest of a minor to a state's interest in her welfare during the entire course of the minor's pregnancy.

A state's use of its police power to regulate the sexual conduct of minors must be legitimate and not arbitrary.¹²⁸ The California Legislature ostensibly enacted section 25958 to further the welfare of pregnant minors by forcing them to discuss their abortion decisions with their parents.¹²⁹ This rationale, however, was criticized in *Dan-*

patriae asserted by the State of Arizona in committing a 15 year-old, against his father's wishes, to the state Industrial School); Note, *supra* note 116, at 975 n.73, (citing Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978) (discussing the development of the doctrine of *parens patriae*); Note, *The Minor's Right of Privacy: Limitations on State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216, 1221 (1977) ("The common law's presumption that children, like madmen, sailors, and women, lacked sufficient capacity to understand and consent to the consequences of certain actions effectively narrowed the rights of minors").

125. Note, *supra* note 124, at 1222-23 (states have generally denied constitutional rights or confronted minors with capacity requirements where a minor's activities, including abortions, have traditionally been "viewed as posing serious consequences for the minor").

126. See A.C.L.U., REPRODUCTIVE FREEDOM PROJECT, PARENTAL NOTICE LAWS; THEIR CATASTROPHIC IMPACT ON TEENAGERS' RIGHT TO ABORTION 4 (1986) (abortion is one of the safest surgical procedures performed). Until after eight weeks of gestation, the risk for all women of death or major health complications from an abortion is about twenty times lower than that of childbirth. *Id.* The disparity in these rates for teenagers alone is even greater. *Id.* See also *id.* at 14-15. "Dr. Willard Cates, former head of the Abortion Surveillance Branch of the United States Centers for Disease Control . . . has concluded that 'delay [in receiving an abortion] has the largest single effect on the risk to teenagers for complications and death from abortion'." *Id.* Further, parental consent or notification requirements delay even those minors who choose to notify their parents rather than go to court because of the duty of physicians to document minors' compliance. *Id.*

127. See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (Justice Powell, writing for the majority, noted a minor's "inability to make critical decisions in an informed and mature manner"); 1987 Cal. stat. ch. 1237, sec. 1, at ____ (the immediate and long-range consequences of an abortion may entail serious medical, emotional and psychological consequences for an immature minor).

128. See *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) ("rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state").

129. See 1987 Cal. stat. ch. 1237, sec. 1, at ____ (enumerating legislative findings regarding the need for minors to discuss with their parents the consequences of an abortion). *C.f.* San Francisco Chronicle, Oct. 12, 1987, at 6-7 (interview with Barbara Alby, executive director of the pro-life Women's Lobby). Ms. Alby stated that "youngsters soon will be sitting down just like they used to and saying 'Mom, Dad, I'm in trouble and I need your help' . . . something good happens when parents [from good, broken and even problem homes] are involved." *Id.*

forth when the Court disagreed with the Missouri Legislature's assertion that parental control of their children's abortions would further the children's welfare by strengthening their families.¹³⁰

2. *The Right To The Integrity Of The Family*

States, when exercising their police powers and powers as *parens patriae*, must be careful not to tread on parents' rights to raise their children as they wish. By providing for a judicial bypass procedure to allow "mature" minors to circumvent the statute's parental consent requirements, section 25958 interferes with these parental interests.¹³¹ The constitutional right and responsibility of parents to raise and guide their children as they see fit may prevail over "unwarranted or unreasonable interference" from a state.¹³² Furthermore, the Fourteenth Amendment ensures the right "to marry, establish a home and bring up children" ¹³³ Historically, parents could assert authority over their children in all areas of the child's life unless the state could overcome that right with another strong public policy.¹³⁴ This right of parents extended until the child reached the age of majority or became emancipated in one of various ways.¹³⁵

130. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976). See generally Note, *In re Scott K.: The Juvenile's Right to Privacy in the Home*, 68 CALIF. L. REV. 783, 790 (1980) (discussing the *Danforth* Court's view of the consequences of forcing communication between a parent and a pregnant daughter); Dembitz, *The Supreme Court and a Minor's Abortion Decision*, 80 COLUM. L. REV. 1251 (1980) (parental consent abortion laws rarely relate to and are often contrary to a minor's well-being).

131. CAL. HEALTH & SAFETY CODE § 25958(b)-(d) (West Supp. 1989).

132. *Planned Parenthood v. Danforth*, 428 U.S. 52, 73 (1976). See Comment, *Parent, Child, and the Decision to Abort: A Critique of the Supreme Court's Statutory Proposal in Bellotti v. Baird*, 52 S. CAL. L. REV. 1869, 1871 (1979) ("Because state intervention on behalf of the child may also carry the potential threat of state exploitation of the child, and because such a threat is particularly inimical to a pluralistic society when value-oriented interests are involved, the moral guidance and preparation of the child for the 'additional obligations' of life has been the duty of the parent, not the state"). See generally *Newton v. Burgin*, 363 F. Supp. 782, 785-86 (W.D.N.C. 1973) (discussion of the constitutional status of these rights of parents) *aff'd*, 414 U.S. 1139 (1974). See also generally Comment, *Confidential Communication Between Parent and Child: A Constitutional Right*, 16 SAN DIEGO L. REV. 811 (1979) (discussing the Constitutional protection preventing a state from compelling a parent to disclose an unemancipated son or daughter's confidences).

133. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

134. See Dobson, *The Juvenile Court and Parental Rights*, 4 FAM. L.Q. 393, 396 (1970) ("The line between neglect and the right of parents to rear their children must be drawn against the state's interest in the rights the children have in being provided with substantial opportunity and a chance for a successful life").

135. *Id.* at 395 ("either voluntarily or by operation of the law, i.e., by marriage or by entry into the armed services").

The Court, in *Meyer v. Nebraska*, held unconstitutional a statute prohibiting¹³⁶ families from educating their young children in specified foreign languages.¹³⁷ It based its decision on the belief that "the liberty of the family unit may not be interfered with . . . by legislative action which . . . [has no] reasonable relation to some purpose within the competency of the state to effect."¹³⁸ In *Skinner v. Oklahoma*,¹³⁹ the Court stated that a family's right against interference from the state is a basic civil right of man and is fundamental to the survival of the human race.¹⁴⁰

Parents' rights, however, are not absolute.¹⁴¹ In *Runyan v. McCrary*,¹⁴² the Court upheld a Congressional Act desegregating, over the protests of parents, racially discriminatory private schools.¹⁴³ In *Baker v. Owen*,¹⁴⁴ the Court similarly held that parental authorization

136. *Id.* at 397 (the prohibition applied until a child "attained and successfully passed the eighth grade").

137. *Id.* at 403.

138. *Id.* at 400. See *Santoski v. Kramer*, 455 U.S. 745 (1982) (the Court recognized a fundamental right in the parent-child relationship when it held that states must provide procedural safeguards against improperly removing children from their parents); *Ginsberg v. New York*, 390 U.S. 629 (1968) (holding that a statute defining obscenity in terms of an appeal of the prurient interest of minors was constitutional). "The parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id.* at 639; *Stanley v. Illinois*, 405 U.S. 645 (1972) (an unwed father has a constitutional right to custody of his illegitimate children when their mother dies). Compare *id.* with *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (denying an unmarried father the right to veto the adoption of his children when the father had "never exercised actual or legal custody and thus [had] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child," and the state had determined that an adoption would be in the child's "best interest"). See also *Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy-Balancing the Individual and Social Interests*, 81 *MICH. L. REV.* 463, 559, (1983) (when the law protects family relationships, it helps "sustain long-term individual liberty").

139. 316 U.S. 535 (1942).

140. *Skinner*, 316 U.S. at 535 (1942). See *Santoski v. Kramer*, 455 U.S. 745 (1982) (states must provide procedural safeguards against improperly removing children from their parents). See also *Stanley v. Illinois*, 405 U.S. 645 (1972) (an unwed father has a constitutional right to custody of his illegitimate children when their mother dies). Compare *id.* with *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (denying an unmarried father the constitutional right to veto the adoption of his children when the father had "never exercised actual or legal custody and thus [had] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child," and the state had determined that an adoption would be in the child's "best interest").

141. See Note, *supra* note 116, at 976 (examples include compulsory schooling, rehabilitation of juvenile delinquents and mandatory vaccination programs).

142. 427 U.S. 160 (1976).

143. *Runyan*, 427 U.S. at 179 (upholding a congressional act to prohibit segregated academies by utilizing the thirteenth, along with the first, amendment). But see *Patterson v. McLean Credit Union*, 108 S. Ct. 1419 (1988) (the Court will rehear arguments to determine "[w]hether or not [the decision of] *Runyan v. McCrary* . . . should be reconsidered?").

144. 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd*, 423 U.S. 907 (1975).

for the corporeal punishment of their children in school is not constitutionally required.¹⁴⁵ Thus an analysis of statutes allowing state protection of minors who are unable or unwilling to seek the consent of their parents to obtain abortions requires a different constitutional balance than that of statutes pitting only the interests of the state and family against each other. When analyzing the parental consent issue, the constitutional interests of minors seeking aid *from* the state to escape the denial of abortion rights by parents must also be considered.

C. Supreme Court Guidelines For Parental Consent Statutes

The Supreme Court has grappled with parental consent statutes similar to section 25958 and has tried to balance conflicting constitutional interests of pregnant minors, states and families. Unfortunately, the Court has not defined in a majority opinion the degree of state or parental control that may be exerted over a minor's abortion decisions. Members of the Court have, however, forwarded constitutional standards, all of which uphold parental consent requirements within specified constraints.¹⁴⁶

The United States Supreme Court first addressed a "parental consent" abortion law in *Danforth*.¹⁴⁷ The Missouri statute in question required an unmarried woman under age eighteen to obtain the consent of a parent,¹⁴⁸ regardless of the stage of her pregnancy, in order to obtain an abortion.¹⁴⁹ The Court invalidated the requirement by holding that states may not impose a "blanket" parental veto power.¹⁵⁰ Justice Blackmun, the opinion's author, explained that "blanket" requirements of parental consent are unconstitutional because "any independent interest the parents [might] have in the termination of the minor daughter's pregnancy [is] no more weighty than the right of privacy of the competent minor mature enough to

145. *Baker*, 395 F. Supp. at 303.

146. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 1344 (2d ed. 1988).

147. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

148. *See id.* at 58 (or person in loco parentis).

149. *Id.* ("unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother"). A physician violating the parental consent provision would be deemed guilty of a misdemeanor offense. *Id.* at 59.

150. *Id.* at 74 ("the state does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent").

have become pregnant.”¹⁵¹ The Court tested the statute’s constitutionality by asking “whether there is any significant state interest in conditioning an abortion on the consent of a parent . . . that is not present in the case of an adult.”¹⁵² It then found that a parent’s unconditional abortion veto power would probably not safeguard family units or parental authority, as the state had asserted.¹⁵³ The Court concluded that the statute must fall because it violated minors’ privacy rights “without a sufficient justification for the restriction.”¹⁵⁴

The Supreme Court again found a parental consent law unconstitutional and delivered a second standard by which to judge the constitutionality of parental consent abortion laws in *Bellotti v. Baird* (*Bellotti II*).¹⁵⁵ The challenged Massachusetts statute not only required a parent’s consent, but also allowed a judge, by finding that an abortion was not in that particular minor’s best interest, to override the wishes of a minor to make an abortion decision.¹⁵⁶ No majority of Justices coalesced to agree on one opinion in *Bellotti II*.¹⁵⁷ Justice Powell reasoned that minors may not always have constitutional rights equivalent to adults because: (1) children are peculiarly vulnerable; (2) they are unable to make critical decisions in an informed and mature manner; and (3) parents play an important role in child rearing.¹⁵⁸

Upon that reasoning, Justice Powell presented new minimum requirements by which the constitutionality of parental consent statutes

151. *Id.* at 75. See Comment, *supra* note 54, at 183 (this acknowledgment of a privacy right for minors “represents a major step in minors’ struggle for constitutional protection”).

152. *Danforth*, 428 at 74.

153. *Id.* (especially where “the very existence of the pregnancy already has fractured the family structure”).

154. *Id.*

155. 443 U.S. 622 (1979).

156. *Bellotti II*, 443 U.S. at 643-44 (to approve the abortion, a court had to find that the abortion would be in the best interest of the minor who was well-informed of the implications of her decision).

157. The *Bellotti II* Court divided into four camps. Chief Justice Burger, along with Justices Stewart and Rehnquist joined Justice Powell in proposing a new constitutional standard by which to measure parental consent abortion statutes. *Id.* at 624. Justices Brennan, Marshall and Blackmun joined Justice Stevens in concurring with Justice Powell, but this group held to a narrow interpretation of the *Danforth* standard. *Id.* at 652 (Stevens, J. concurring). Justice White dissented from both positions, arguing that a parent has an unqualified right of notification of the parent’s child’s desire to obtain an abortion. *Id.* at 656 (White, J. dissenting). Justice Rehnquist, in a separate concurring opinion, noted that he joined Justice Powell’s decision only until *Danforth* could be reevaluated, and only to provide some guidance to lower court judges. *Id.* at 651 (Rehnquist, J., concurring).

158. *Id.* at 634.

could be judged.¹⁵⁹ He concluded that the abortion rights of minors can be restricted so that pregnant minors must obtain consent for their abortions by one or both parents¹⁶⁰ or obtain authorization by petitioning a court or nonjudicial hearing agency.¹⁶¹ The court or agency may be required to determine the "maturity"¹⁶² or "best interest" of a minor before approving the petition.¹⁶³ This alternate route of authorization must be prompt and confidential to ensure that a minor who has been granted authorization still has time to obtain the abortion.¹⁶⁴ Accordingly, a court or agency that failed to find that a pregnant minor who did not obtain parental consent was sufficiently mature or that an abortion would not be in her best interest could thereby deny the minor access to a legal abortion.¹⁶⁵ Justice Powell's *Bellotti II* standard for allowing pregnant minors to show that they are mature and well-informed enough to make their abortion decisions was criticized by Justice Stevens for failing to guide a judge in determining a minor's maturity or best interests.¹⁶⁶ He argued that the standard "provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor . . . is fundamentally at odds with the privacy interests underlying the constitutional protection afforded to her decision."¹⁶⁷

Despite Justice Stevens' criticism, the Court majority followed the reasoning of Justice Powell's *Bellotti II* plurality opinion along with that of *Danforth* in upholding a Utah parental notification statute in *H.L. v. Matheson*.¹⁶⁸ In *Matheson*, a fifteen year old girl sought to obtain an abortion without notifying her parents, with whom she

159. *Id.* at 643-44.

160. *Id.* at 649 (the plurality would allow a state to require the consent of both parents when both parents are living together with a minor, so that procuring parental consent would not unduly delay the statutory procedure). That plurality, however, noted that the mutual decision of a minor and only one of her parents "should be given great, if not dispositive weight." *Id.* at 649 n.29.

161. *Id.* at 643 n.22.

162. *Id.* at 643.

163. *Id.* at 647-48.

164. *Id.* at 644.

165. *Id.* at 648.

166. *Id.* at 648.

167. *Id.* at 654-55 (Stevens, J., concurring).

168. 450 U.S. 398 (1981). Chief Justice Burger delivered the Court's opinion, in which Justices Stewart, White, Powell and Rehnquist joined. *Id.* at 399. Justice Powell filed a concurring opinion in which Justice Stewart joined. *Id.* at 413 (Powell, J., concurring). Justice Stevens filed a separate concurring opinion. *Id.* at 420 (Stevens, J., concurring). Finally, Justice Marshall wrote a dissenting opinion, in which Justices Brennan and Blackmun joined. *Id.* at 425 (Marshall, J., dissenting).

lived.¹⁶⁹ The physician, however, refused to perform her operation without notifying the girl's parents, as the Utah law required.¹⁷⁰

Chief Justice Burger, who wrote the opinion for the majority, narrowly analyzed the statute in the situation when a pregnant minor: (1) "is living with and dependant on her parents;"¹⁷¹ (2) was "not emancipated;"¹⁷² and (3) had not shown or attempted to show her maturity or relations with her parents.¹⁷³ He cited constitutional standing rules for excluding analysis of the application of the statute to mature and emancipated minors and thereby skirted the constitutional issue of the statute's failure to provide for a judicial bypass procedure.¹⁷⁴ Thus, when applied to immature and unemancipated minors, the majority reasoned, the notification requirement does not burden abortion rights in any constitutionally significant way.¹⁷⁵ The Court favorably cited Justice Powell's *Bellotti II* concern with serving important considerations of family integrity and protecting immature and dependent minors.¹⁷⁶ The Court also reaffirmed the *Danforth* test in holding that the statute furthered the significant state interest of protecting the family relationship by providing parents the opportunity to "supply essential medical and other information to a physician" prior to the abortion.¹⁷⁷

Powell's opinion applied the standard set forth by the plurality opinion in *Bellotti II* in deciding *City of Akron v. Akron Center for Reproductive Health, Inc.*¹⁷⁸ and *Planned Parenthood Association v. Ashcroft*,¹⁷⁹ both of which concerned parental consent statutes. In *Akron*, the Court found an Ohio parental consent regulation unconstitutional because it created an irrebuttable presumption that all minors under the age of fifteen are immature.¹⁸⁰ Thus the Court invalidated the provision for failing to provide a judicial bypass procedure for minors under fifteen in which they could prove their maturity or best interests.¹⁸¹ Although the *Ashcroft* Court was unable

169. *Id.* at 400-01.

170. *Id.* at 400.

171. *Id.* at 407.

172. *Id.* (by marriage or otherwise).

173. *Id.*

174. *Id.* at 406-07.

175. *Id.* at 409 (citing *Bellotti II*).

176. *Id.* at 411.

177. *Id.* See *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

178. 462 U.S. 416 (1983).

179. 462 U.S. 476 (1983).

180. *Akron*, 462 U.S. at 440.

181. *Id.*

to join in a majority opinion, the Court found the Missouri parental consent provision constitutional because it met the *Bellotti II* plurality's standards.¹⁸² The statute analyzed in *Ashcroft* provided for confidential and expeditious judicial authorization procedures and therefore met constitutional standards.¹⁸³

In light of its use of Justice Powell's *Bellotti II* principles in its reasoning in *Matheson*, *Akron* and *Ashcroft*, the Court is likely to continue to analyze parental consent abortion statutes like section 25958 by applying Justice Powell's *Bellotti II* model.¹⁸⁴ That model, as explained by Justice Powell, necessarily incorporates *Danforth's* ban against "blanket" parental veto powers.¹⁸⁵ Although Justice Powell's *Bellotti II* opinion mentioned the importance of merely "important" state interests,¹⁸⁶ the *Matheson* Court's reaffirmance of *Danforth's* "significant state interests" test may reestablish that standard as one which parental consent abortion statutes must meet to survive constitutional scrutiny.¹⁸⁷

Section 25958's parental consent and judicial bypass provisions must meet these standards in order to pass constitutional muster. Section 25958 provides an alternate judicial bypass route by which a minor may circumvent the parental consent requirement.¹⁸⁸ This judicial bypass provision allows a court to determine a minor's maturity or best interests in deciding whether or not to approve her petition for an abortion.¹⁸⁹ The statute also requires an expeditious consideration by the court of a minor's request.¹⁹⁰ The statute,

182. *Ashcroft*, 462 U.S. at 478 (only Justice Burger joined Justice Powell in his opinion finding the parental consent provision constitutional). Justices O'Connor, White and Rehnquist voted to uphold the provision, but indicated that they would vote in future decisions to give greater control over minors to parents. *Id.* at 505 (O'Connor, J., concurring). Justices Blackmun, Brennan, Marshall and Stevens found the provision unconstitutional. *Id.* at 503-04 (Blackmun, J., concurring and dissenting). These Justices argue that minors who decide whether to seek an abortion should not be subjected to the veto powers of parents or state authorities. *Id.*

183. *See id.* at 479 n.4 (the statute allowed a maximum of 5 days for the judicial review of the minor's petition). *See also* *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1134-39 (7th Cir. 1983) (the court applied the constitutional principles set forth in *Akron* and *Ashcroft* to find unconstitutional a statute failing to require the expeditious review of petitions).

184. J. NOWAK, R. ROTUNDA AND J. YOUNG, *CONSTITUTIONAL LAW* 706 (3d ed. 1986) ("For the time being, the principles set forth in Justice Powell's plurality opinion in *Bellotti II* will prevail, because in those instances when the Powell tests are met, there will be a majority of justices voting to uphold the parental consent requirement").

185. *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976)). *See supra* notes 151-52 and accompanying text.

186. *Bellotti II*, 443 U.S. at 648.

187. *H.L. v. Matheson*, 450 U.S. 398, 411 (1981).

188. CAL. HEALTH & SAFETY CODE § 25958(b) (West Supp. 1989).

189. *Id.*

190. *Id.*

therefore, should meet the *Danforth* requirement against blanket parental veto powers.¹⁹¹ The California provision was passed, ostensibly, to protect the health and safety of pregnant unemancipated minors.¹⁹² Identical state interests were considered sufficient to uphold a parental consent abortion statute in Justice Powell's *Bellotti II* opinion, and in *Matheson*.¹⁹³ Thus, section 25958 meets the constitutional requirements set forth in Justice Powell's *Bellotti II* model; therefore it should survive scrutiny under the United States Constitution.¹⁹⁴

IV. CALIFORNIA CONSTITUTIONAL ISSUES

The constitutionality of section 25958 also depends on the history and breadth of California's right of privacy.¹⁹⁵ The California Constitution explicitly guarantees this right,¹⁹⁶ the Legislature has provided sexual and other privacy rights of minors,¹⁹⁷ and the California Supreme Court has protected sexual and other privacy rights in several cases.¹⁹⁸ The court, however, has not mandated a particular test by which section 25958 may be measured.¹⁹⁹ This section will first illuminate the history and breadth of the California right of privacy.²⁰⁰ Then this section will review sexual and health care privacy rights in California.²⁰¹ Within this paradigm, this section will review the California Supreme Court's analysis and legislative provisions of the right of sexual privacy,²⁰² and suggest a standard by which section 25958 may be tested.²⁰³

A. *The History and Breadth of the California Right of Privacy*

The right of privacy in California, as distinguished from the federal right, was guaranteed even prior to its express recognition in the

191. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

192. 1987 Cal. stat. ch. 1237, sec. 1, at ____.

193. *See Bellotti v. Baird*, 443 U.S. 622, 648 (1979); *H.L. v. Matheson*, 450 U.S. 398, 411 (1981).

194. *Bellotti II*, 443 U.S. at 644.

195. *See infra* notes 204-40 and accompanying text.

196. *See* CAL. CONST. art. I, § 1.

197. CAL. CIV. CODE §§ 25.9-34.10 (West 1982).

198. *See infra* notes 204-46, 263-84 and accompanying text.

199. *See infra* note 285 and accompanying text.

200. *See infra* notes 204-40 and accompanying text.

201. *See infra* notes 241-301 and accompanying text.

202. *See infra* notes 241-84 and accompanying text.

203. *See infra* notes 285-301 and accompanying text.

state Constitution in psychotherapist-patient communications,²⁰⁴ personal financial disclosures,²⁰⁵ the contents of trash cans,²⁰⁶ and the freedom of welfare recipients from early morning government raids to determine welfare eligibility.²⁰⁷ In 1969, four years before *Roe*, the California Supreme Court recognized a constitutional right of procreative choice, when in *People v. Belous*,²⁰⁸ it invalidated a 119-year old statute prohibiting non life-threatening abortions.²⁰⁹

In 1972, California voters passed an amendment to the state Constitution which explicitly guarantees the right of privacy to all California citizens.²¹⁰ The California right has been more broadly interpreted than the federal right, as noted by the California Supreme Court, in *City of Santa Barbara v. Adamson*.²¹¹ In *Adamson*, the court refused to rely on the federal cases of *Belle Terre v. Boraas*²¹² and *Moore v. City of East Cleveland*²¹³ in upholding the rights of unrelated persons to choose to dwell together.²¹⁴ According to Justice Newman, who wrote the majority opinion, "even if Justice Douglas's majority opinion in *Belle Terre* still does declare federal law, the federal right of privacy in general appears to be narrower than what the voters approved . . . when they added "privacy" to the California Constitution."²¹⁵ California courts have also consistently led the

204. See, e.g., *In re Lifschutz*, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

205. See, e.g., *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970).

206. See, e.g., *People v. Edwards*, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969).

207. See, e.g., *Parrish v. Civil Serv. Comm'n.*, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

208. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970). See generally Comment, *Roe! Doe! Where are You?: The Effect of the Supreme Court's Abortion Decisions*, 7 U.C. DAVIS L. REV. 432 (1974) (emphasizing the effects of *Roe* and *Bolton* on California law).

209. *Belous*, 71 Cal. 2d at 973-74, 458 P.2d at 206, 80 Cal. Rptr. at 366.

210. CAL. CONST. art. I, § 1. The section provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy." *Id.* See generally Gerstein, *supra* note 73, at 386 (The explicit constitutional language gives the California right of privacy "a more secure foundation" than the federal right); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (describing the trend of the states to incorporate privacy rights in their own state constitutions).

211. 27 Cal. 3d 123, 130 n.3, 610 P.2d 436, 440 n.3, 164 Cal. Rptr. 539, 543 n.3 (1980).

212. 416 U.S. 1 (1974).

213. 431 U.S. 494 (1977).

214. But see *In re Cummings*, 30 Cal. 3d 870, 640 P.2d 1101, 180 Cal. Rptr. 826, (1982) (upholding a prison regulation defining only those related to a prisoner by blood or law as "immediate family" to qualify for overnight visitation rights).

215. *Adamson*, 27 Cal. 3d at 130 n.3, 610 P.2d at 440 n.3, 164 Cal. Rptr. at 543 n.3.

federal courts in recognizing personal privacy rights, and have more broadly defined these protections.²¹⁶

The privacy right in California need not rely on emanations from other explicit rights or from interpretations of the United States Supreme Court because the California Supreme Court has held that "the California Constitution is, and always has been, a document of independent force."²¹⁷ The California court, in *C.D.R.R. v. Myers*, emphasized that principles of federalism create the responsibility of state courts to maintain state constitutions as the "first . . . line of protection of the individual against the excesses of local officials."²¹⁸ Accordingly, the court noted that state courts are "independently responsible" for protecting the separate and unique constitutional rights of citizens of the individual states.²¹⁹ This obligation is particularly pertinent to Californians because in 1972 voters adopted a constitutional amendment providing that the "rights guaranteed by this [California] Constitution are not dependent on those guaranteed by the United States Constitution."²²⁰

The California Supreme Court, in interpreting the scope of the California privacy right, relied on the language of the official voter pamphlet distributed when the privacy amendment was on the ballot in *White v. Davis*.²²¹ The *White* court stated that "California decisions have long recognized the propriety of resorting to such election brochure arguments as an aid in construing constitutional amend-

216. See *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 291-92, 625 P.2d 779, 803-04, 172 Cal. Rptr. 866, 890 (1981) (Bird, J., concurring). Compare, e.g., *Ballard v. Anderson*, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971) (refusing to interpret a California statute to give parents veto powers over the abortions of their mature minors), *Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17 (1948) (right to choose a marriage partner regardless of race), *In re Klor*, 64 Cal. 2d 816, 415 P.2d 791, 51 Cal. Rptr. 903 (1966) (right to possess obscene materials in the privacy of one's house) and *People v. Ramey*, 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629 (1976) (protection from warrantless arrest in one's home), cert. denied, 429 U.S. 929 (1976) with *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), *Loving v. Virginia*, 388 U.S. 1 (1967), *Stanley v. Georgia*, 394 U.S. 557 (1969) and *Payton v. New York*, 445 U.S. 573 (1980).

217. *People v. Brisendine*, 13 Cal. 3d 528, 549-50, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975).

218. *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d at 261, 625 P.2d at 783, 172 Cal. Rptr. at 870 (1981) (quoting *People v. Brisendine*, 13 Cal. 3d at 550, 531 P.2d at 1113, 119 Cal. Rptr. at 329).

219. *Id.* (quoting *Brisendine*, 13 Cal. 3d at 551, 531 P.2d at 1114, 119 Cal. Rptr. at 330). See *id.* at 262, 625 P.2d at 784, 172 Cal. Rptr. at 871 (quoting *People v. Chavez*, 26 Cal. 3d 334, 605 P.2d 401, 161 Cal. Rptr. 762 (1980) (the California Supreme Court stated that it is to "recognize [its] personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions").

220. CAL. CONST. art. I, § 24.

221. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

ments ”²²² It also emphasized the broad requirement of governmental respect for the privacy of individuals in the pamphlet’s description of the right as: “the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communication and our freedom to associate with the people we choose.”²²³

White was brought by a University of California professor who sued the Los Angeles police department for allegedly monitoring his classes and making reports on discussions the police observed.²²⁴ The reports, which were kept in police files, did not pertain to illegal activities.²²⁵ The Supreme Court held that the action constituted a “prima facie violation of the state constitutional right of privacy.”²²⁶ Similarly, in *People v. Privitera*,²²⁷ the California court again examined the voter pamphlet and emphasized that “the moving force behind the new constitutional provision was a more focused privacy concern relating to the accelerated encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society.”²²⁸ The *Privitera* court found no evidence of an intention of the California voters to create a specific “right of access to drugs of unproven efficacy,” like laetrile.²²⁹

Justice Newman, dissenting in *Privitera*, disagreed with the majority’s approach of “[reading] the amendment as if it were a statutory prohibition rather than the simple and majestic statement of a fundamental constitutional right.”²³⁰ The California court has since extended the privacy right, while ignoring the *Privitera* interpretation of the right to privacy, in *Adamson* and *Myers*.²³¹ *Adamson*, which protected the privacy of those who choose to dwell together, and

222. *White*, 13 Cal. 3d at 775 n.11, 533 P.2d at 234 n.11, 120 Cal. Rptr. at 106 n.11 (1975).

223. *Id.* at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105 (quoting Cal. Ballot Pamphlet of 1972, at 28). See Gerstein, *supra* note 73, at 405 (“To say that we have a privacy right in this sense is to say that the integrity of these aspects of our lives demands respect”).

224. *White*, 13 Cal. 3d at 762, 533 P.2d at 225, 120 Cal. Rptr. at 97.

225. *Id.*

226. *Id.* at 776, 533 P.2d at 234, 120 Cal. Rptr. at 106.

227. 23 Cal. 3d 697, 591 P.2d 919, 153 Cal. Rptr. 431 (1979), *cert. denied*, 444 U.S. 949 (1979).

228. *Privitera*, 23 Cal. 3d at 710, 591 P.2d at 926, 153 Cal. Rptr. at 438.

229. *Id.* at 709, 591 P.2d at 926, 153 Cal. Rptr. at 438.

230. Gerstein, *supra* note 73, at 404-05.

231. See *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981); *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).

Myers, which protected the right of indigent women, to obtain abortions broadened the California constitutional privacy protection to protect Californians not only from government "snooping," but also from intrusive government regulations.²³²

The California Supreme Court applied strict scrutiny analysis to contested government actions burdening or impairing the right of privacy in California in *White, People v. Stritzinger*²³³ and *Long Beach City Employees Association v. City of Long Beach*.²³⁴ In *White*, the California court directed the trial court to apply the standard to scrutinize the asserted police interests for monitoring university classroom discussions,²³⁵ and in *Stritzinger* the court applied the standard to determine whether the constitutional privacy interest in the psychotherapist-patient privilege had been violated by the state.²³⁶ In *Long Beach City Employees Association*, the court required the city to show a compelling interest and demonstrate the necessity of its policy of polygraph-examining a broad category of city employees.²³⁷ Justice Broussard, writing for the majority, noted that "there may be a rational relationship between polygraph testing as a method of investigation," but that the City's justification of "maintaining the real and apparent integrity of the public service" was not "compelling."²³⁸ The court noted, without elaborating, the availability of "less intrusive means to investigate alleged wrongdoing."²³⁹ Because the polygraph testing scheme was unnecessarily intrusive, the court held it invalid under the California right of privacy.²⁴⁰

B. Rights to Sexual and Health Care Privacy in California

1. Supreme Court Analysis and Legislative Provisions

The California Supreme Court, like its federal counterpart, has established substantive rights of sexual and health care privacy.

232. Gerstein, *supra* note 73, at 406.

233. 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983).

234. 41 Cal. 3d 937, 719 P.2d 660, 227 Cal. Rptr. 90 (1986).

235. *White v. Davis*, 13 Cal. 3d 757, 772, 533 P.2d 223, 232, 120 Cal. Rptr. 94, 104 (1975).

236. *Stritzinger*, 34 Cal. 3d at 511, 668 P.2d at 742, 194 Cal. Rptr. at 435.

237. *Long Beach City Employees Ass'n.*, 41 Cal. 3d at 948, 719 P.2d at 666, 227 Cal. Rptr. at 96 (1986).

238. *Id.* at 952, 719 P.2d at 669, 227 Cal. Rptr. at 99.

239. *Id.*

240. *Id.*

Belous and *Myers* establish in California a general right similar to the federal one "to make sensitive reproductive health care decisions without the unwarranted intrusion of government."²⁴¹ The broader California right, furthermore, is explicitly guaranteed by the California Constitution to "all persons."²⁴² California courts "readily apply to minors the general concepts of privacy."²⁴³ These courts have held that minors: (1) may bring a tort action for invasion of privacy;²⁴⁴ (2) enjoy a state constitutional privacy right against unreasonable searches and seizures;²⁴⁵ and (3) have a similar right as against school officials' standing in loco parentis.²⁴⁶

The California legislature, too, has protected the privacy of unemancipated minors in a series of Civil Code sections that emancipate minors to consent for their medical care.²⁴⁷ These provisions have given minors considerable latitude to obtain reproductive and other types of health care and counseling without parental consent.²⁴⁸ The statutes additionally provide a personal right to confidentiality of medical records.²⁴⁹ Specifically, the California Civil Code provides minors of any age the right to independently consent to: (1) "Hospital, medical and surgical care, related to the prevention or treatment of pregnancy,"²⁵⁰ which before the enactment of section 25958 included abortions,²⁵¹ and (2) treatment for sexual assault.²⁵² Minors

241. See *Planned Parenthood Affiliates v. Van de Kamp*, 181 Cal. App. 3d 245, 277, 226 Cal. Rptr. 361, 378 (1986).

242. See *id.* at 278, 226 Cal. Rptr. at 379. See also *In re William G.*, 40 Cal. 3d 550, 556, 709 P.2d 1287, 1290, 221 Cal. Rptr. 118, 121 (1985) ("It is well settled that minor[s] . . . are 'persons' under our state . . . [Constitution] and therefore possess fundamental rights which the state must respect").

243. *Id.*

244. See, e.g., *Vescovo v. New Way Enters., Ltd.*, 60 Cal. App. 3d 582, 587-88, 130 Cal. Rptr. 86, 89 (1976).

245. See, e.g., *In re Scott K.*, 24 Cal. 3d 395, 595 P.2d 105, 155 Cal. Rptr. 671 (1979), *cert. denied*, 444 U.S. 973 (1979). See generally Note, *supra* note 130, at 786 ("The *Scott K.* majority appeared to argue that this 'right to privacy' should, by virtue of *Carey [v. Population Servs. Int.]*, 431 U.S. 678 (1977) and [*Planned Parenthood v.*] *Danforth*, [428 U.S. 52 (1976)] be granted to juveniles whenever it has been granted to adults").

246. *In re William G.*, 40 Cal. 3d at 560-61, 709 P.2d at 1292-93, 221 Cal. Rptr. at 123-24 (public high school officials without prior knowledge about a student's possession, use or sale of marijuana have no reasonable basis to search a student's calculator case).

247. *Planned Parenthood Affiliates v. Van de Kamp*, 181 Cal. App. 3d 245, 269, 226 Cal. Rptr. 361, 372 (1986) (citing CAL. CIV. CODE §§ 25.9-34.10) (West 1982).

248. *Id.*

249. *Id.* at 269, 226 Cal. Rptr. at 373.

250. CAL. CIV. CODE § 34.5 (West Supp. 1989).

251. See *Ballard v. Anderson*, 4 Cal. 3d 873, 884, 484 P.2d 1345, 1353, 95 Cal. Rptr. 1, 9 (1971) (interpreting former California Civil Code section 34.5 to allow mature minors to obtain abortions along with other pregnancy-related health care). See also 1987 Cal. stat. ch.

of at least twelve years of age are emancipated to consent to treatment for: (1) Communicable and sexually transmitted diseases;²⁵³ (2) rape;²⁵⁴ (3) drug and alcohol abuse;²⁵⁵ and (4) mental health counseling.²⁵⁶ Minors of fifteen years of age and older are emancipated to consent to surgical and other specified hospital treatment.²⁵⁷ Civil Code sections 56.10-56.16²⁵⁸ and Health and Safety Code section 25252²⁵⁹ additionally give California minors the right to the privacy of their confidential medical records. Although these statutes allow minors sexual²⁶⁰ and other²⁶¹ privacy rights, the California Supreme Court has determined that they are not absolute.²⁶²

The California Supreme Court, in *Ballard v. Anderson*,²⁶³ interpreted the Civil Code to allow minors to independently obtain abortions, but limited the right to minors of sufficient maturity to be able to give an "informed consent" to the procedure.²⁶⁴ The court later held in *Myers* that although sexual privacy rights generally could be impaired, the manner of impairment must be the "least offensive alternative adequate to achieve any legitimate state interest."²⁶⁵ This standard "requires the state to 'establish the unavailability of less offensive alternatives and [to] demonstrate that the conditions are

1237, sec. 2 at ____ (amending CAL. CIV. CODE § 34.5) (requiring a minor to procure a parent's consent in order to obtain an abortion).

252. CAL. CIV. CODE § 34.9 (West 1982).

253. *Id.* § 34.7.

254. *Id.* § 34.8.

255. *Id.* § 34.10.

256. *Id.* § 25.9.

257. *Id.* § 34.6.

258. *Id.* §§ 56.10-56.16 (West 1982) (providing that only the minor may consent to disclosure of the minor's confidential medical records).

259. CAL. HEALTH & SAFETY CODE § 25252 (allowing only the minor and the minor's health care representative to have access to specified medical records of the minor).

260. CAL. CIV. CODE §§ 34.5, 34.7 (West 1982 & Supp. 1989).

261. *Id.* §§ 25.9, 34.6, 34.8, 34.9, 34.10.

262. See *Ballard v. Anderson*, 4 Cal. 3d 873, 883, 484 P.2d 1345, 1352, 95 Cal. Rptr. 1, 8 (1971) (limiting abortion rights of minors to those minors of sufficient maturity to give informed consent to the surgery).

263. 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971).

264. *Ballard*, 4 Cal. 3d at 883, 484 P.2d at 1352, 95 Cal. Rptr. at 8 (emphasis in original) (interpreting California Civil Code section 34.5). See *Planned Parenthood Affiliates v. Van de Kamp*, 181 Cal. App. 3d at 271 n.10, 226 Cal. Rptr. at 374 n.10 (the California Court of Appeals for the First Appellate District considered this precedent and specifically extended the right to sexual privacy under the state Constitution to at least the mature minor, "who may very well be under 14"). See also *People v. Toliver*, 270 Cal. App. 2d 492, 496, 75 Cal. Rptr. 819, 822 (1969) (children under the age of 14 constitute a protected class under the California statute prohibiting lewd and lascivious conduct with minors under the age of 14) *cert. denied*, 396 U.S. 895 (1969).

265. *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 282, 531 P.2d 779, 797, 172 Cal. Rptr. 866, 884 (1981).

drawn with narrow specificity, restricting the exercise of constitutional rights only to the extent necessary to maintain the integrity of the program which confers the benefits'.²⁶⁶ Thus the presumption in section 25958, that all minors are too immature to make abortion decisions unless they demonstrate otherwise,²⁶⁷ and the requirement of parental consent to obtain an abortion²⁶⁸ raise two issues under the right of privacy in the California Constitution: (1) What standard of judicial scrutiny should be used to measure the constitutionality of section 25958, and (2) whether any burden on this right of minors is subject to the "least offensive alternative necessary to achieve the state's interests" test.²⁶⁹

The California court has applied three different standards in determining the requisite state interest in its decisions concerning the California right of sexual privacy. First, in *People v. Belous*²⁷⁰ and *Conservatorship of Valerie N.*,²⁷¹ the court applied strict scrutiny to invalidate the state's prohibition of most abortions.²⁷² In *Valerie N.*, the court found the state to have no compelling interest in denying access to sterilization for an incompetent thirty year old developmentally disabled adult.²⁷³

In contrast, the court used a rational basis standard to invalidate a contested interpretation of a statute emancipating minors for pregnancy-related medical care in *Ballard*.²⁷⁴ In that case, Dr. Ballard, a surgeon at the Los Angeles County-U.S.C. Medical Center, sued the Center on behalf of his pregnant and unemancipated minor patients.²⁷⁵ Dr. Ballard and his patients disagreed with the Center's

266. *Id.*

267. CAL. HEALTH & SAFETY CODE § 25958(b) (West Supp. 1989).

268. *Id.* § 25958(a).

269. *Myers*, 29 Cal. 3d at 282, 531 P.2d at 797, 172 Cal. Rptr. at 884.

270. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

271. 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985).

272. *Belous*, 71 Cal. 2d at 963-72, 458 P.2d at 199-205, 80 Cal. Rptr. at 359-65 ("The critical issue is . . . whether the state has a compelling interest in the regulation of a subject which is within the police powers of a state . . . , whether the regulation is necessary to the accomplishment of a permissible state policy . . . and whether legislation impinging on constitutionally protected areas is narrowly drawn and not 'unlimited and indiscriminate sweep.'"); *Valerie N.*, 40 Cal. 3d at 164-69, 707 P.2d at 774-78, 219 Cal. Rptr. at 401-05 (" . . . we must determine whether the state has a compelling interest . . . and if so, whether [the legislation] is necessary to accomplish the state purpose. Similarly, in assessing any restriction on the exercise of a fundamental constitutional right, we must determine whether the state has a compelling interest . . . in regulating the subject, whether the regulation is necessary to accomplish the purpose, and if the restriction is narrowly drawn").

273. *Valerie N.*, 40 Cal. 3d at 164-69, 707 P.2d at 774-78, 219 Cal. Rptr. at 401-05.

274. *Ballard v. Anderson*, 4 Cal. 3d 873, 883, 484 P.2d 1345, 1352, 95 Cal. Rptr. 1, 8.

275. *Id.* at 876-78, 484 P.2d at 1346-48, 95 Cal. Rptr. at 2-4.

Therapeutic Abortion Committee's assertion that former California Civil Code section 34.5, allowing a minor of any age to obtain confidential pregnancy-related surgical care, should be interpreted to require parental consent for a minor's abortion.²⁷⁶ The court agreed with Ballard, holding that there is no rational basis for requiring all minors, regardless of their maturity, to obtain parental consent.²⁷⁷

A third standard of review of governmental infringements of sexual privacy was used by the court in *Myers*. The *Myers* court used a tripartite test which was established in *Bagley v. Washington Township Hospital District*.²⁷⁸ This test has been applied to statutory schemes "that condition the receipt of [governmental] benefits upon a recipient's waiver of a constitutional right or upon his exercise of such right in a manner which the government approves."²⁷⁹ Under this test, the state must do the following: (1) "Establish that the imposed conditions relate to the purposes of the legislation which confers the benefit or privilege;"²⁸⁰ (2) show that "the utility of imposing the conditions must manifestly outweigh any resulting impairment of constitutional rights;"²⁸¹ and (3) "establish the unavailability of less offensive alternatives and demonstrate that the conditions are drawn with narrow specificity . . . to maintain the integrity of the program which confers the benefits."²⁸² In *Bagley*, the court applied a statute prohibiting specified public employees from campaigning for the recall of their supervisors to this test.²⁸³ The court

276. *Id.* at 877, 484 P.2d at 1346-47, 95 Cal. Rptr. at 3.

277. *Id.* at 883, 484 P.2d at 1352, 95 Cal. Rptr. at 8.

278. See Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 265, 625 P.2d 779, 786, 172 Cal. Rptr. 866, 873 (1981); *Bagley v. Washington Township Hosp. Dist.*, 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966) (finding unconstitutional restraints imposed upon the political activities of public employees).

279. *Myers*, 29 Cal. 3d at 257, 625 P.2d at 781, 172 Cal. Rptr. at 868 (1981). See, e.g., *Fort v. Civil Serv. Comm'n.*, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964) (finding broadly worded restrictions on the political activities of public employees unconstitutional); *Vogel v. County of Los Angeles*, 68 Cal. 2d 18, 434 P.2d 961, 64 Cal. Rptr. 409 (1967) (persons can not be barred from public employment for associating in a manner protected by the first amendment); *Parrish v. Civil Serv. Comm'n.*, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967) (holding unconstitutional the government practice of conditioning the receipt of welfare benefits upon a recipient's waiver of his constitutional right of privacy in his home); *Wirta v. Alameda-Contra Costa Transit Dist.*, 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967) (striking down public transit agency's policy that allowed advertising space on public buses for commercial expression but not for political commentary); *Finot v. Pasadena City Bd. of Educ.*, 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967) (action by a board of education and a school district of assigning a teacher to a less-desirable assignment because he wore a beard in violation of school policy was held unconstitutional).

280. *Bagley*, 65 Cal. 2d at 505-06, 421 P.2d at 414, 55 Cal. Rptr. at 406.

281. *Id.* at 506, 421 P.2d at 415, 55 Cal. Rptr. at 407.

282. *Id.* at 507, 421 P.2d at 415, 55 Cal. Rptr. at 407.

283. *Id.* at 507-11, 421 P.2d at 415-18, 55 Cal. Rptr. at 407-10.

invalidated the enactment when the state failed to sufficiently justify its prohibition.²⁸⁴

2. A Standard for Measuring Section 25958 under the California Constitution

In determining the proper standard of review for section 25958, this statute should be compared to the enactments analyzed in *Belous* and *Valerie N.*, *Ballard* and *C.D.R.R. v. Myers*.²⁸⁵ Because section 25958 does not deny all abortion rights to minors, the strict scrutiny standard of *Belous* and *Valerie N.* should not apply. *Belous* addressed a near blanket prohibition of all abortions;²⁸⁶ *Valerie N.* concerned a denial of all sterilization rights to incompetent Californians.²⁸⁷ In contrast, the rational basis standard used in *Ballard* may not provide a strict enough gauge by which to measure section 25958.²⁸⁸ Although the *Ballard* court asked merely whether a rational basis existed for infringing the abortion rights of minors, the court specifically did not analyze whether the statute itself could stand. Rather the court discussed whether abortions could rationally be distinguished from other "pregnancy-related surgical care."²⁸⁹ This ultimate question suggests that *Ballard* was decided on equal protection overbreadth grounds as well as on concerns regarding the privacy rights of minors.

The tripartite *Bagley* test used in *Myers* appears to be the most appropriate for assessing the constitutionality of section 25958 under the California Constitution.²⁹⁰ The test is applicable to statutes like section 25958 that "condition . . . [the] exercise of [a constitutional] right in a manner which the government approves."²⁹¹ Using this test, the first question is whether section 25958's conditions relate to the legislation's purposes.²⁹² Because the legislation's stated purpose

284. *Id.*

285. *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969); *Conse-
vatorship of Valerie N.*, 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985); *Ballard v.
Anderson*, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971); *Committee to Defend
Reproductive Rights v. Myers*, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981).

286. *Belous*, 71 Cal. 2d at 963-72, 458 P.2d at 199-205, 80 Cal. Rptr. at 359-65.

287. *Valerie N.*, 40 Cal. 3d at 164-69, 707 P.2d at 774-78, 219 Cal. Rptr. at 401-05.

288. *See Ballard*, 4 Cal. 3d at 883, 484 P.2d at 1352, 95 Cal. Rptr. at 8.

289. *Id.* at 883, 484 P.2d at 1352, 95 Cal. Rptr. at 8.

290. *Myers*, 29 Cal. 3d at 257, 625 P.2d at 781, 172 Cal. Rptr. at 868.

291. *Id.* at 257, 625 P.2d at 781, 172 Cal. Rptr. at 868.

292. *Bagley v. Washington Township Hosp. Dist.*, 65 Cal. 2d 499, 505-06, 421 P.2d 409,
414, 55 Cal. Rptr. 401, 406 (1966).

is to further the welfare of pregnant unemancipated minors²⁹³ and section 25958's conditions ostensibly relate to that purpose, this statute should meet the test's first part. The second question under the test is whether the utility of imposing section 25958's conditions manifestly outweigh resulting impairments of minors' rights.²⁹⁴ Because all minors, according to *Ballard*, do not have absolute rights to sexual privacy,²⁹⁵ a court would probably defer to the Legislature's determination that the requirements of section 25958 are necessary to further their welfare.²⁹⁶

Finally, the third question under the *Bagley-Myers* test is whether section 25958 must be the least offensive alternative necessary to facilitate the state's interests in the welfare of minors.²⁹⁷ Section 25958 broadly impairs not only the ability of immature minors to obtain abortions, but also impairs the sexual privacy rights of mature minors under the California Constitution, as stated in *Ballard*.²⁹⁸ Section 25958, in presuming the immaturity of all minors, burdens all pregnant minors who do not wish to obtain parental consent with the onus of proving their maturity to a juvenile court.²⁹⁹ On balance, the state interests in the health and welfare of minors can not justify this suffocation of the legitimate constitutional rights of mature minors.³⁰⁰ The statute, by imposing the presumption of immaturity on all minors is not the least offensive alternative necessary to achieve California's interests.³⁰¹ Section 25958 therefore should be invalidated as unconstitutionally overbroad under the California Constitution.

V. A CONSTITUTIONAL CONSENT PROVISION

Although section 25958 is probably constitutional under the federal constitutional standard,³⁰² and is probably unconstitutional under the

293. 1987 Cal. stat. ch. 1237, sec. 1 at ____.

294. *Bagley*, 65 Cal. 2d at 506, 421 P.2d at 415, 55 Cal. Rptr. at 407.

295. *Ballard v. Anderson*, 4 Cal. 3d 873, 883, 484 P.2d 1345, 1352, 95 Cal. Rptr. 1, 8 (1971) (limiting abortion rights of minors to those minors of sufficient maturity to give informed consent to the surgery).

296. 1987 Cal. stat. ch. 1237, sec. 1, at ____.

297. *Bagley*, 65 Cal. 2d at 507, 421 P.2d at 415, 55 Cal. Rptr. at 407.

298. See *Ballard*, 4 Cal. 3d at 880, 484 P.2d at 1350, 95 Cal. Rptr. at 6.

299. See CAL. HEALTH & SAFETY CODE § 25958(b) (West Supp. 1989).

300. See *Ballard*, 4 Cal. 3d at 873, 484 P.2d at 1352, 95 Cal. Rptr. at 8.

301. See generally Comment, *Aborting the Rights of Minors? Questioning the Constitutionality of California's Parental Consent Statute*, 19 PAC. L.J. 1487 (1988) (finding that section 25958 unduly burdens mature minors and those minors for whom an abortion is in their best interest).

302. See *supra* notes 188-94 and accompanying text.

California Constitution,³⁰³ the California Legislature has had the opportunity to consider less restrictive parental consent provisions. For example, Assembly Bill 67 of the 1987 California Legislative Session would likely pass muster under both constitutions.³⁰⁴ That bill, although defeated in the California Assembly, would have meaningfully furthered the State's interest in protecting pregnant minors and assuring family integrity. Importantly, the provisions of 1987 Assembly Bill 67 would have avoided dragging the most intimate aspects of the lives of young women into court.

1987 Assembly Bill 67, like section 25958, would have required pregnant unemancipated minors to procure the consent of their parents to obtain abortions.³⁰⁵ Like section 25958, the proposal would have provided a means other than a parent's consent for minors to obtain authorization for abortions.³⁰⁶ The bill, however, would have provided for the least offensive means necessary to facilitate the state's interest in the welfare of minors.³⁰⁷ By meeting this third prong of the *Bagley-Myers* test, the bill, if enacted, would have been constitutional under the California Constitution.³⁰⁸

Assembly Bill 67 would have provided that the alternate abortion authorization could be provided by a unit within each county's child welfare services agency instead of by a juvenile court.³⁰⁹ A hearing officer from the agency's staff would have met with a pregnant minor³¹⁰ and either approve or deny the minor's abortion authorization request upon determination of her maturity level and best interest.³¹¹ Section 25958 fails to evince respect for the sexual privacy of mature minors by presuming all minors who wish to obtain abortions without procuring parental consent to be immature unless they prove otherwise to a court.³¹²

Assembly Bill 67 would have prevented judges from using different individual determinations of particular minors' "best interests" by

303. See *supra* notes 290-301 and accompanying text.

304. A.B. 67, 1986-87 Cal. Leg., Reg. Sess. (as introduced Dec. 3, 1986) (the bill, authored by Assemblyman Phil Isenberg, was significantly amended and eventually defeated in the Assembly during the 1987 Legislative Session).

305. *Id.*, sec. 2.

306. *Id.*

307. See *Bagley v. Washington Township Hosp. Dist.*, 65 Cal. 3d 499, 507, 421 P.2d 409, 415, 55 Cal. Rptr. 401, 407 (1966).

308. See A.B. 67, sec. 5, 1986-87 Cal. Leg., Reg. Sess. (Dec. 3, 1986).

309. *Id.*

310. *Id.*

311. *Id.*

312. See CAL. HEALTH & SAFETY CODE § 25958(b) (West Supp. 1989).

specifying factors for making individual determinations.³¹³ These factors included: (1) Incest by a parent, or sexual activity between a minor and her stepparents, guardian or others; (2) the abandonment by, or absence of, the parents; (3) the existence of alcohol or drug abuse; and (4) the existence of child abuse.³¹⁴ The county child welfare services agency would have been required to assist a minor to prepare her petition, advise her of the availability of appointed counsel to represent her, and provide a guardian ad litem if necessary to prevent a minor from being intimidated from presenting her case.³¹⁵ Additionally, 1987 Assembly Bill 67 would have required the agency to take steps to ensure a minor's confidentiality and minimize any psychological barriers a minor might encounter during the proceeding.³¹⁶ Section 25958 fails to provide guidelines for courts to use in determining the "best interests" of pregnant minors.³¹⁷ Section 25958's failure to provide uniform guidelines is also a failure to use the least offensive means necessary to achieve the state's goal of protecting the welfare of minors.³¹⁸ Judges are presumptively left to use any means at hand to make this determination.

A statute with provisions like those in 1987 Assembly Bill 67 would better achieve the state's purpose of caring for the best interests of pregnant immature minors, and would provide the least offensive alternative necessary to facilitate the state's interests. Provisions for interviewing minors with social workers from a non-judicial agency would be as effective, as the *Bellotti II* plurality noted, or even superior to the comparable provision of section 25958.³¹⁹ This method of interviewing would probably allow for more accurate determinations of the maturity or best interests of pregnant minors. A social worker interviewing in an informal office setting seems more likely to elicit candid and accurate information from a minor than could a judge in a foreign and imposing courtroom.³²⁰

313. See A.B. 67, sec. 5, 1986-87 Cal. Leg., Reg. Sess. (Dec. 3, 1986).

314. *Id.*

315. *Id.*

316. *Id.*

317. See CAL. HEALTH & SAFETY CODE § 25958(b) (West Supp. 1989).

318. See *Bagley v. Washington Township Hosp. Dist.*, 65 Cal. 3d 499, 507, 421 P.2d 409, 415, 55 Cal. Rptr. 401, 407 (1966).

319. See *Bellotti v. Baird*, 443 U.S. 623, 643 n.22 (1979) ("Indeed, much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction").

320. See *id.* at 645-55 (Stevens, J., concurring) (the minor's burden of appearing before a court to obtain permission to have an abortion is "as great, if not greater than that imposed on the minor to obtain her parent's consent").

The state interest of advising all minors of the gravity of their predicaments and their procreative options would also be served by the provisions of a statute like 1987 Assembly Bill 67. A minor would more likely understand and retain the information provided in the less-intimidating atmosphere of a social worker's office than in a courtroom. The requirement that minors meet these statutory provisions would still accomplish the state's significant interest in protecting the integrity of families³²¹ by encouraging a pregnant minor to discuss her pregnancy with a parent. A statute like 1987 Assembly bill 67 would more likely pass muster under the California Constitution because it better respects the rights of sexual privacy of pregnant minors in California.

VI. CONCLUSION

The United States Supreme Court, in *Roe v. Wade*,³²² recognized the psychological, emotional and social harm caused by restrictions of a woman's ability to have an abortion. Similar restrictions on the ability of minors to obtain the procedure can be equally if not more severely devastating to pregnant minors, especially considering the greater physical risks of teenage pregnancies. Yet California courts will be under great political pressure by pro-life groups to find section 25958 valid under both the federal and California constitutions. The courts should be sensitive to the position of section 25958 in the forefront of attacks on women's procreative rights generally. "Those charged with the responsibility of choice must avoid too myopic an adherence to the matter at hand, recognizing that the ultimate results of incremental change might be wholly alien, and perhaps profoundly objectionable, to those who acquiesce step by step."³²³

Section 25958 should be found valid under the federal Constitution. The California Constitution, however, provides greater sexual and health care privacy rights to all Californians, including minors. Under the constitutional gauge established in *Bagley v. Washington Township Hospital District* and used in *C.D.R.R. v. Myers*, an enactment that conditions the exercise of constitutional rights on statutory requirements must be the least offensive alternative necessary to achieve a legislative goal. Section 25958 does not meet this test.

321. See *supra* notes 131-45 and accompanying text.

322. 410 U.S. 113 (1973).

323. Kahn, *The Tyranny of Small Decisions*, INT'L. REV. SOC. SCI., 19, 23 (1966).

California courts should therefore recognize the dangers section 25958 poses to the physical and mental health of minors as well as to the abortion rights of all women, and invalidate the statute under the California Constitution.

Gregory W. Herring

